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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1964

No. 415

DAVID A. GOLDNER,

*Petitioner,*

v.

EDWARD S. SILVER,
District Attorney, Kings County, State of New York,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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# INDEX


| | PAGE |
|---|---|
| Citations to Opinions Below | 1 |
| Jurisdiction | 2 |
| Questions Presented | 2 |
| Constitutional Provisions Involved | 4 |
| Statement | 4 |
| Reasons for Granting the Writ | 7 |
| I | 7 |
| II | 9 |
| A.—Disbarment is equivalent to a criminal proceeding | 9 |
| B.—The exclusionary rule should apply to all legal proceedings, civil or criminal | 12 |
| III | 16 |
| A.—The subpoena was tantamount to search and seizure | 17 |
| B.—The broad subpoena was a roving and general search | 17 |
| C.—Petitioner's compliance with the subpoena was neither waiver of constitutional rights nor consent to search | 18 |
| IV | 20 |

PAGE

V ..... 21

VI ..... 22

Conclusion ..... 24

Appendix A, Subpoena ..... App. A-1

Appendix B:

Report and Recommendations of Referee .. App. B-1

Memorandum Opinion of Appellate Division ..... App. B-68

Order Affirmance of Court of Appeals .... App. B-70

## Cases Cited

*Abel* v. *United States*, 362 U.S. 217 (1960) ..... 14, 16

*Aetna Ins. Co.* v. *Kennedy*, 301 U.S. 389 (1937) .... 19

*Amos* v. *United States*, 255 U.S. 313 (1921) ..... 18

*Boyd* v. *United States*, 116 U.S. 616 (1886) .. 14, 16, 17, 20

*Burdeau* v. *McDowell*, 256 U.S. 465 (1921) ..... 13

*Bushouse* v. *United States*, 67 F. 2d 843 (6th Cir. 1933) ..... 21

*Chicago* v. *Lord*, 3 Ill. App. 2d 410, 122 N.E. 2d 439 (1954), *affirmed* 7 Ill. 2d 379, 130 N.E. 2d 504 (1955) ..... 15

*Cohen* v. *Hurley*, 366 U.S. 117 (1961) ..... 10, 11, 12, 19

*District of Columbia* v. *Little*, 178 F. 2d 13, *affirmed on other grounds*, 339 U.S. 1 (1950) ..... 15

PAGE

*Elkins* v. *United States*, 364 U.S. 206 (1960) .....13, 14
*Entick* v. *Carrington*, 19 Howell's State Trials 1029 (1765) ..... 20
*Eskridge* v. *Washington State Board of Prison Terms and Paroles*, 357 U.S. 214 (1958) ..... 8
*Essgee Company of China* v. *United States*, 262 U.S. 151 (1923) ..... 17

*Fahy* v. *Connecticut*, 375 U.S. 85 (1963) .....8, 23
*Frank* v. *Maryland*, 359 U.S. 360 (1959) .....14, 15
*Freeman* v. *United States*, 160 F. 2d 72 (9th Cir. 1947) ..... 20

*Gouled* v. *United States*, 255 U.S. 298 (1921) ..... 20
*Greene* v. *McElroy*, 360 U.S. 474 (1959) .....22, 23
*Griffin* v. *Illinois*, 351 U.S. 12 (1956) ..... 8

*Hall* v. *Warden*, 313 F. 2d 483 (4th Cir. 1963) *cert. den.* 374 U.S. 809 (1963) ..... 8
*Harris* v. *United States*, 331 U.S. 145 (1947) ..... 17
*Hartman* v. *Hartman*, 253 Wis. 389, 34 N.W. 137 (1948) ..... 15
*Henry* v. *United States*, 361 U.S. 98 (1959) ..... 17
*Hudson* v. *Slade*, 3 Foster and Finlason (Q.B.) 390 411 (1862) ..... 10

*In re Anastaplo*, 366 U.S. 82 (1961) ..... 19
*In re Ginsburg*, 147 F. 2d 749 (2d Cir. 1945) ..... 20
*In re Oliver*, 333 U.S. 257 (1948) .....22, 23

*Jencks* v. *United States*, 353 U.S. 657 (1957) ..... 22
*Johnson* v. *United States*, 333 U.S. 10 (1948) ..... 18
*Johnson* v. *Zerbst*, 304 U.S. 458 (1938) ..... 19

PAGE

*Konigsberg* v. *State Bar of California*, 353 U.S. 252 (1957) ..... 10, 19, 24

*Lebel* v. *Swincicki*, 354 Mich. 427, 93 N.W. 2d 281 (1958) ..... 15

*Malloy* v. *Hogan*, — U.S. —, 84 S.Ct. 1489 (1964) 2, 7, 8, 9, 12, 21

*Mapp* v. *Ohio*, 367 U.S. 643 (1961) 2, 6, 7, 8, 9, 12, 13, 14, 21

*Marcus* v. *Search Warrant*, 367 U.S. 717 (1961) .... 18

*Marron* v. *United States*, 275 U.S. 192 (1927) ..... 18

*Nelson* v. *United States*, 208 F. 2d 505 (D.C. Cir. 1953), *cert. den.* 346 U.S. 827 (1953) ..... 19

*Ohio ex rel. Eaton* v. *Price*, 364 U.S. 263 (1960) .... 14

*Olmstead* v. *United States*, 277 U.S. 438 (1928) .... 14

*Pennsylvania ex rel. Herman* v. *Claudy*, 350 U.S. 116 (1956) ..... 8

*Re Cohen*, 199 N.Y.S. 2d 658 (1960), *affirmed Cohen* v. *Hurley*, 366 U.S. 117 (1961) ..... 19

*Roviaro* v. *United States*, 353 U.S. 53 (1957) ..... 22

*Sackler* v. *Sackler*, 229 N.Y.S. 2d 61 (1962) ..... 9, 15

*Schware* v. *Board of Bar Examiners of New Mexico*, 353 U.S. 232 (1957) ..... 12

*Takahashi* v. *United States*, 143 F. 2d 118 (9th Cir. 1944) ..... 20

*Twining* v. *New Jersey*, 211 U.S. 78 ..... 12

*U.S.* v. *Walker*, 323 F. 2d 11 (5th Cir. 1963) *cert. granted* — U.S. —, 84 S. Ct. 1340 (May 18, 1964) 8

PAGE

*United States* v. *Lefkowitz*, 285 U.S. 452 (1932) ....20, 21
*United States* v. *Lerner*, 100 F. Supp. 765 (N.D. Cal. 1951) .....20, 21
*United States* v. *Thomson*, 113 F. 2d 643 (7th Cir. 1940) ..... 21

*Williams* v. *United States*, 282 F. 2d 940 (6th Cir. 1960) ..... 13

AUTHORITY CITED

United States Constitution:

Fourth Amendment ....2, 3, 4, 6, 7, 9, 13, 16, 17, 20, 21
Fifth Amendment .....2, 3, 4, 7, 9, 16, 17, 20, 21
Fourteenth .....2, 3, 4, 6, 7, 9, 16, 21, 22

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District Attorney, Kings County, State of New York,

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## PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals of New York, entered in this cause on March 26, 1964, affirming an order of the Appellate Division, Second Department, permanently disbarring petitioner from the practice of law.

### Citations to Opinions Below

The Report of the Special Referee is unreported and is printed in Appendix B, *infra*, p. 1.

The memorandum opinion of the Appellate Division, printed in Appendix B, *infra*, p. 68, is reported in 15

A.D. 2d 558, 222 N.Y.S. 2d 854 (December 27, 1961). The order of the Court of Appeals of New York (March 26, 1964), which affirmed the order of disbarment of the Appellate Division without opinion, is printed in Appendix B, *infra*, p. 70.

## Jurisdiction

The judgment of the Court of Appeals of the State of New York was entered on March 26, 1964. Upon petitioner's timely application, the time within which petition for certiorari might be filed was extended by this Court from June 24, 1964 until August 21, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. §1257 (3), since rights, privileges and immunities under the United States Constitution are claimed to have been violated.

## Questions Presented

I. Whether the decisions in *Mapp* v. *Ohio* and *Malloy* v. *Hogan*, holding, respectively, that the Fourth and Fifth Amendments to the United States Constitution are commands upon the states through the due process clause of the Fourteenth Amendment, apply to preserve for review these due process questions in a state disbarment proceeding which originated in advance of these judicial pronouncements, but in which an appeal was pending at the time of these rulings.

II. Whether the federal exclusionary rule is a requirement of due process of law in state administrative proceedings, state grand jury investigations and state disciplinary actions against attorneys, whether or not such proceedings are criminal in nature.

III. Whether, during the course of an investigation of professional misconduct of lawyers, a subpoena *duces tecum* issued by a grand jury to a lawyer whose conduct was under investigation, which called for the production of all his books, cancelled checks, cash books, ledgers, check stubs, tax returns, bank books, record of all investments and all financial records, both business and personal, for the years 1953 through 1956 inclusive, was so broad as to constitute an illegal search within the meaning of the Fourth, Fifth and Fourteenth Amendments to the United States Constitution.

IV. Whether the surrender to the state Judicial Inquiry of all of the financial records described in (III) above pursuant to its subpoena *duces tecum* was an illegal seizure of evidentiary matter in violation of the Fourth, Fifth and Fourteenth Amendments to the United States Constitution.

V. Whether, after timely demand, the refusal of the State district attorney, state and federal courts and the state Judicial Inquiry, to return petitioner's books and records during the three year interval between their seizure pursuant to subpoena in November, 1957 and the disciplinary hearing in December, 1960, deprived petitioner of his right to prepare a defense and therefore constituted a denial of due process of law in violation of the Fourteenth Amendment to the United States Constitution.

VI. Whether petitioner's disbarment as a result of a finding against him in his disciplinary hearing on charges which had never been made against him prior to the hearing, and against which he had no opportunity to defend before the ruling against him, was in violation of the due process clause of the Fourteenth Amendment.

## Constitutional Provisions Involved

The pertinent portions of the provisions of the United States Constitution here involved are set out below:

Amendment XIV, Section 1, Clause 2:

> ". . . nor shall any State deprive any person of life, liberty, or property without due process of law. . . ."

Amendment IV:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment V:

> "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ."

## Statement

Petitioner was admitted to practice law in New York in 1949. He is married and has two children. After a period of apprenticeship with another firm, he established his own office and developed an active practice in negligence cases. (H. 426-429).[1]

This case involves an order of disbarment and related orders made by the Appellate Division, Second Judicial

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[1] The transcript of the hearing before the Special Referee is referred to throughout as "H" followed by a page reference. The Report of the Special Referee is referred to as "Report". The Supplemental Record is referred to as "SR"; Supplemental Record A is referred to as "SRA". Numerical references following "SR" and "SRA" are to folios unless otherwise indicated.

Department of New York, pursuant to findings and recommendations of a Special Referee appointed to conduct the disciplinary hearing in question. The disbarment proceeding grew out of a judicial inquiry ordered by the Appellate Division, Second Department into solicitation and related practices in Kings County, New York.

As part of the Judicial Inquiry's investigation, on November 15, 1957 petitioner was served with a subpoena requiring him to produce for the Inquiry's examination all of his personal and business records, tax returns, bank books, check stubs and cancelled checks for the years 1953 through 1956, inclusive. (SR. 118-129; Appendix A, pp. 1-3) Upon compulsion of disbarment for failure to cooperate with the Inquiry, the petitioner complied with the terms of the broad and sweeping subpoena (SR. 32, 74, 83, 120). He testified before the Inquiry on two occasions in May and June of 1958 (SR. 33, 84). Thereafter, the Appellate Division, Second Judicial Department, ordered the District Attorney's office to proceed against the petitioner, and a petition charging 33 counts of misconduct was served. The matter was referred to a Special Referee, who, after a hearing, found the petitioner guilty on three of the counts contained in the petition. Petitioner was also found guilty of fabrication of evidence and perjury—charges which were nowhere contained in the petition and of which he had no notice prior to the written opinion of the Special Referee.

During the three-year hiatus between the issuance of the subpoena and the hearing, the petitioner made repeated attempts to get back his books and records. Oral and written requests for their return were made to the Presiding Justice of the Inquiry and to the District Attorney; application for the return and suppression of such evidence was made to the federal district court, and the Appellate Division, Second Judicial Department

on at least two occasions, all to no avail. (SR. 75-84; 181-183). The federal constitutional questions involving illegal search and seizure were raised throughout these proceedings (SR. 75-76, 77-82, 82-83). Although no court had ever impounded them, and no order of discovery had issued, and although they were vital to the petitioner's defense of the disbarment proceeding because they comprised all petitioner's financial records during the period covered by the charges against him, the Judicial Inquiry and the District Attorney's Office never returned them. Indeed, they were admittedly used by the agents of the Judicial Inquiry to develop evidence that appellant handled settlement payments to his clients improperly. The records in question consisted, among other things, of a ledger book, checks and check stubs for the four-year period covered by the charges against petitioner and they contained information essential to the preparation of his defense. But, with the exception of some of the records introduced into evidence, the records were not returned.

The Special Referee heard testimony in the proceeding against petitioner from December 1, 1960 until December 7, 1960. After the hearing, the Special Referee recommended disbarment (Report, pp. 60-61). On June 19, 1961, after the hearing but before the exhaustion of petitioner's appellate remedies, this Court applied the Fourth Amendment exclusionary rule to the States through the Fourteenth Amendment in *Mapp* v. *Ohio*, 367 U.S. 643 (1961).

Thereafter, several motions were made before the Appellate Division. The District Attorney moved to confirm the Referee's Report. Petitioner opposed the motion and moved to set aside the report because the use of the illegally seized evidence at the hearing "violated the constitutional guarantees against illegal and unreasonable

search and seizure" and because withholding of the seized evidence from petitioner "was a deprivation of due process". (SR. 67-69) Petitioner's motion to set aside the report was denied (SR. 61-66). Respondent's motion to confirm the report was granted and petitioner was ordered disbarred (App. B-68). The court's memorandum opinion is reported at 15 App. Div. 2d 558, 222 N.Y.S. 2d 854. On March 26, 1964, the New York Court of Appeals affirmed the order of disbarment without opinion. (App. B-70). It is from this order that petitioner seeks relief by petition for certiorari in this Court.

## Reasons for Granting the Writ

### I.

Both *Mapp* v. *Ohio*, 367 U.S. 643 (1961) applying the federal exclusionary rule to the States as a constitutional command of the Fourth and Fourteenth Amendments, and *Malloy* v. *Hogan*, — U.S. —, 84 S.Ct. 1489 (1964), applying the self-incrimination clause of the Fifth Amendment to the States through the Fourteenth, were decided *after* the original disciplinary hearing which resulted in petitioner's disbarment, but *before* he had exhausted his appellate remedies.

Since petitioner urges that the minimal federal constitutional requirements of the Fourth and Fifth Amendments have not been met in the state proceeding which resulted in his disbarment (see argument *infra*, pp. 16-21), the question of the extent to which these landmark decisions will be applied retroactively is squarely before this Court.

While petitioner is aware of no case in which this Court has indicated the extent to which it would apply

the *Mapp* rule to pending litigation,[2] there have been several lower court pronouncements on the subject.[3] While they differ as to whether they would limit retrospective application of *Mapp* to pending litigation where regular appellate remedies had not been exhausted at the time the *Mapp* decision was announced[4] or permit *habeas corpus* even after the exhaustion of regular appellate remedies[5], the rule appears to be clear that *Mapp* applies to persons whose cases were pending on appeal at the time *Mapp* was decided. For "[t]heir cases were not yet past history when Mapp was decided."[6] Moreover, there is much to be said for the contention that application of *Mapp* to pending appeals is not retrospective application at all, since the exclusionary rule is applied only to cases which *subsequently* reach this Court.

While it is too early to find reported case experience dealing with the retrospective application of *Malloy* v. *Hogan*, there is analogous case experience to suggest that this Court will not look unfavorably upon such application of the rule there announced. E.g., *Griffin* v. *Illinois*, 351 U.S. 12 (1956); Cf. *Eskridge* v. *Washington State Board of Prison Terms and Paroles*, 357 U.S. 214 (1958) (*Griffin* rule applied to conviction in *1935*). See also *Pennsylvania ex rel. Herman* v. *Claudy*, 350 U.S. 116 (1956). Moreover, this Court has indicated in *Malloy* that its holding was implicit in *Mapp* v. *Ohio*.[7]

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[2] Cf. *Fahy* v. *Connecticut*, 375 U.S. 85 (1963).

[3] E.g., *Hall* v. *Warden*, 313 F. 2d 483 (4th Cir. 1963) *cert. den.* 374 U.S. 809 (1963); *U.S.* v. *Walker*, 323 F. 2d 11 (5th Cir. 1963) *cert. granted* — U.S. —, 84 S. Ct. 1340 (May 18, 1964).

[4] *U.S.* v. *Walker*, 323 F. 2d 11 (5th Cir. 1963) *cert. granted* — U.S. —, 84 S. Ct. 1340 (May 18, 1964).

[5] *Hall* v. *Warden*, 313 F. 2d 483 (4th Cir. 1963) *cert. den.* 374 U.S. 809 (1963).

[6] *U.S.* v. *Walker*, 323 F. 2d 11, 19 (5th Cir. 1963) *cert. granted* — U.S. —, 84 S. Ct. 1340 (May 18, 1964).

[7] *Malloy* v. *Hogan*, — U.S. —, 84 S. Ct. 1489, 1494 (1964).

Since both *Mapp* and *Malloy* were decided during the course of petitioner's appeal, it is just, proper and consistent with the policy of these cases to test the due process afforded petitioner in the state proceeding below by both Fourth and Fifth Amendment standards as commands upon the state through the Fourteenth Amendment.

## II.

The respondent has urged (with startling success in the New York state courts below) that the petitioner has had all the due process of law he deserves because his disbarment proceeding was not a criminal action and that the exclusionary rule of *Mapp* v. *Ohio* cannot be applied to suppress illegally obtained evidence in non-criminal cases.[8]

This Court is now called upon to determine (A) whether a disbarment proceeding is of a sufficiently criminal nature to compel the strict application of the requirements of criminal due process in testing its constitutional validity, or (B) whether, notwithstanding its non-criminal administrative nature, the judicial inquiry and disciplinary proceeding in which petitioner was involved was still subject to the *Mapp* exclusionary rule.

### A.

### Disbarment is equivalent to a criminal proceeding.

It seems elementary that a legal proceeding in which the prosecuting arm of the state initiates an action against an accused for wrongful acts which, if proved, will result in punishment of the accused by ordering his valuable

[8] Citing *Sackler* v. *Sackler*, 229 N.Y.S. 2d 61 (1962) as authority for his contention.

property confiscated bears a striking similarity to criminal proceedings. As Mr. Justice Black has pointed out in discussing a denial of admission to the bar[9] in *Konigsberg* v. *State Bar of California*, 353 U.S. 252, 257-258 (1957):

> "While this is not a criminal case, its consequences for Konigsberg take it out of the ordinary run of civil cases. The Committee's action prevents him from earning a living by practicing law. This deprivation has grave consequences for a man who has spent years of study and a great deal of money in preparing to be a lawyer."

The severe consequences of disbarment have long been recognized[10] and recently clearly and eloquently described by Mr. Justice Black:

> "It is beyond dispute that one of the important ends served by the practice of law is that it provides a means of livelihood for the lawyer and those dependent upon him for support. That means of earning a livelihood is not one that has been conferred upon the lawyer as a gift from the State. Quite the contrary, it represents a substantial investment in time, money and energy on the part of the person who prepares himself to go into the legal profession. Moreover, even after a lawyer has been admitted to practice, a further substantial investment must be made to enable the lawyer to build up the sort of good will that lies

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[9] See Mr. Justice Harlan, speaking for the Court in *Cohen* v. *Hurley*, 366 U.S. 117, 123 (1961):

> "The fact that such refusal was here made a ground for *disbarment*, rather than for *denial of admission to the bar* . . . is not of constitutional moment." (Emphasis added)

[10] See *Hudson* v. *Slade*, 3 Foster and Finlason (Q.B.) 390. 411 (1862):

> ". . . short of those heavy consequences that would attach to the greater and more heinous offences, I own I can conceive of no jurisdiction more serious than that by which a man may be deprived of his degree and status as a barrister, and which, in such a case—perhaps, after he has devoted the best years of his life to this arduous profession,—deprives him of his position as a member of that profession, and throws him back upon the world to commence a new career as best he may, stamped with dishonour and disgrace."

at the root of any successful practice. Young lawyers must and do take on cases in which their ultimate fee is only a fraction of the real value of the work they put into the case in order to build up this sort of goodwill. The lawyer's abilities, acquired through long and expensive education, and the goodwill attached to his practice, acquired in part through uncompensated services, are capital assets that belong to the lawyer—both as a lawyer and as a man, assuming that such a conceptualistic distinction can be drawn.

"These assets should be no more subject to confiscation than his home or any other asset he may have acquired through his industry and initiative. If they are used in violation of an already-existing clear requirement of the law which pronounces as a penalty for violation confiscation of the assets, and if the violation is established in a proceeding in which all the requirements of the 'law of the land' are satisfied that is one thing. But to confiscate the earning capacity that represents a large part of a lawyer's lifetime achievements on the theory that no such asset exists is quite another. The theory that the practice of law is nothing more than a privilege conferred by the State which it can destroy whenever it can assert a 'reasonable' justification for doing so seems to me to permit plain confiscation.

"Even apart from the financial impact, the disbarment of a lawyer cannot help but have a tremendous effect upon that lawyer as a man. The dishonor occasioned by an official pronouncement that a man is no longer fit to follow his chosen profession cannot well be ignored. Such dishonor undoubtedly goes far toward destroying the reputation of the man upon whom it is heaped in the community in which he lives. And the suffering that results falls not only upon the disbarred lawyer but upon his family as well. Government certainly should not be allowed to do this to a man without according him the full benefit of the 'law of the land', both constitutional and statutory."

*Cohen* v. *Hurley*, 366 U.S. 117, 145-147 (dissenting opinion).

Little wonder it is, then, that this Court has clearly announced that "[a] State cannot exclude a person from the practice of law . . . in a manner or for reasons that contravene the Due Process . . . Clause of the Fourteenth Amendment." *Schware* v. *Board of Bar Examiners of New Mexico*, 353 U.S. 232, 238-239 (1957).

To the extent that *Cohen* v. *Hurley*, 366 U.S. 117, 126 (1961) appears to suggest a different emphasis, it must be remembered that only the availability of state constitutional rights in a state disciplinary proceeding were there involved.[11]

Whether it be deemed a "right" or a "privilege", "[c]ertainly the practice of law is not a matter of the State's grace".[12] and disbarment proceedings involve risk of such substantial penalties and bear such a close resemblance to accusatorial criminal procedure as to require at least strict compliance with criminal due process standards.

**B.**

**The exclusionary rule should apply to all legal proceedings, civil or criminal.**

Notwithstanding petitioner's argument above (pp. 9-12) that criminal due process, including the *Mapp* exclusionary rule, should be applied to test the due process

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[11] See Mr. Justice Harlan's language for the Court in *Cohen* v. *Hurley*, 366 U.S. 117, 127-128 (1961):

> ". . . it is suggested that the 14th Amendment gave petitioner a *federal* constitutional right not to be required to incriminate himself in the state proceedings . . . That proposition, however, was explicitly rejected by this Court, upon the fullest consideration, more than fifty years ago, *Twining* v. *New Jersey*, 211 U.S. 78 . . . and such has been the position of the Court ever since." But *cf. Malloy* v. *Hogan*, — U.S. —, 84 S. Ct. 1489 (1964), overruling *Twining* v. *New Jersey*, *supra*.

[12] *Schware* v. *Board of Bar Examiners of the State of New Mexico*, 353 U.S. 232, 239, fn. 5 (1957).

afforded him in the state disciplinary proceeding below because of its *quasi-criminal* nature, petitioner urges the Court to examine the policy reasons behind the exclusionary rule and extend its application to *non-criminal* cases in which the government, federal or state, has had a hand in obtaining the tainted evidence which is sought to be excluded.[13]

What are the policy reasons behind the holding in *Mapp* v. *Ohio* that the rule of exclusion is a constitutional command rather than a mere rule of evidence to be adopted or rejected by each sovereign state at will? It seems clear from the language of the Court in *Mapp* that there were at least three reasons, intertwined to be sure, for so holding: *First,* to demonstrate dramatically and effectively the important place occupied by the right of privacy in our constitutional scheme of freedom;[14] *Second,* to preserve to the government and the courts "that judicial integrity so necessary in the true administration of jus-

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[13] Petitioner is not now urging that evidence illegally obtained by a private person is subject to the operation of the exclusionary rule, although a cogent case can be made to demonstrate the implicit undercutting of the basis of *Burdeau* v. *McDowell*, 256 U.S. 465 (1921), which so held, by *Elkins* v. *United States*, 364 U.S. 206 (1960) (tainted evidence procured by persons not restrained by the command of the Fourth Amendment but turned over to gvoernment agents who are so restrained, held: properly excluded). See dictum in *Williams* v. *United States*, 282 F. 2d 940, 941 (6th Cir. 1960).

[14] "Were it otherwise, then just as without the Weeks rule [of exclusion in federal cases] the assurance against unreasonable federal searches and seizures would be 'a form of words', valueless and undeserving of mention in a perpetual charter of inestimable human liberties, so too, without that rule the freedom from state invasions of privacy would be so ephemeral and so neatly severed from its conceptual nexus with the freedom from all brutish means of coercing evidence as not to merit this Court's high regard as a freedom 'implicit in the concept of ordered liberty' " *Mapp* v. *Ohio*, 367 U.S. 643, 655 (1961).

tice";[15] and *Third*, "to deter—to compel respect for the constitutional guaranty in the only effective available way —by removing the incentive to disregard it".[16] Petitioner urges that all of these reasons—dramatic, moral and practical—are at least as operative in non-criminal litigation as in criminal proceedings. For, while non-criminal administrative proceedings are important, "they are hardly more important than the search for narcotic peddlers, rapists, kidnappers, murderers and other criminal elements"[17] where the exclusionary rule admittedly operates. "It would seem that the public interest in protecting privacy is equally as great in one case as in another."[18]

It must be remembered that *Boyd* v. *United States*, 116 U.S. 616 (1886), which established the rule that use of illegally obtained evidence invalidates the entire legal proceedings in which it is used and which was the point of origin of the long history of the *Mapp* doctrine, was itself a non-criminal administrative proceeding. Moreover, the principles involving the law of search and seizure and the exclusionary rule have been applied by this Court in other cases involving administrative proceedings. Cf. *Abel* v. *United States*, 362 U.S. 217 (1960); *Ohio ex rel. Eaton* v. *Price*, 364 U.S. 263 (1960); *Frank* v. *Maryland*,

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[15] *Mapp* v. *Ohio*, 367 U.S. 643, 660 (1961) and see Mr. Justice Brandeis, dissenting in *Olmstead* v. *United States*, 277 U.S. 438, 485 (1928):

> "Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example . . . . If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy." (quoted with approval in *Mapp* at page 659.)

[16] *Elkins* v. *United States*, 364 U.S. 206, 217 (1960), quoted with approval in *Mapp* at page 656.

[17] *Frank* v. *Maryland*, 359 U.S. 360, 374 (1959) (dissenting opinion).

[18] *Ibid.*

359 U.S. 360 (1959); *District of Columbia* v. *Little*, 178 F. 2d 13, *affirmed on other grounds*, 339 U.S. 1 (1950).

As Christ, *J.*, dissenting in *Sackler* v. *Sackler*, 229 N.Y.S. 2d 61, 65 (1962)[19] has pointed out:

> "The fact of this recent pronouncement in *Mapp* v. *Ohio*, highest court in our land and its application in all Federal and State Courts in criminal prosecutions gives new vitality to the claim for exclusion of tainted evidence in all lawsuits, civil as well as criminal. It is a strange concept which would permit a court of law to encourage the commission of illegal acts by honoring the fruits of the illegality, and which would permit the perpetrator to win a lawsuit by deliberately violating the law.
>
> "It would be a still greater anomoly to bar tainted evidence in a criminal case but at the same time permit its introduction in a civil suit. There is no sound reason for a different rule of admissibility between civil and criminal cases. It should be the same in both. Evidence obtained by the deliberate commission of a crime should be inadmissible on behalf of the perpetrator in the trial of a civil action.

Or, as Judge Hopkins has stated the point:

> "It is anomolous to enforce opposite rules concerning evidence blighted by the same pollution. The unlawful search violates the identical privacy whether its fruits are used to convict in a criminal prosecution, or to forfeit a personal right in a divorce action." *Sackler* v. *Sackler*, 229 N.Y.S. 2d 61, 66 (dissenting opinion). See also *Lebel* v. *Swincicki*, 354 Mich., 427, 93 N.W. 2d 281 (1958); *Chicago* v. *Lord*, 3 Ill. App. 2d 410, 122 N.E. 2d 439 (1954), *affirmed* 7 Ill. 2d 379, 130 N.E. 2d 504 (1955); Cf. *Hartman* v. *Hartman*, 253 Wis. 389, 34 N.W. 137 (1948).

---

[19] Although respondent has attempted in the Courts below to support his position that the exclusionary rule is not applicable to civil cases by citing *Sackler*, a careful reading of the holding demonstrates that it is confined to the issue of tainted evidence procured by *private persons*, an issue not raised here.

Nor is this a radical departure from history. For it must be noted that "the Fourth Amendment in origin had to do as much with ferreting out heretics and collecting taxes as with enforcement of the criminal laws.[20]

This Court is now called upon to reaffirm its position originally taken in *Boyd* and revitalized in the cases which followed *Boyd*, and to set at rest the erroneous contention that the clear prohibitions against invasion of privacy are somehow not enforceable against administrative officials in non-criminal proceedings.

## III.

In the course of the investigation of misconduct of lawyers by the Judicial Inquiry, petitioner was served with a broad and sweeping subpoena which required him to produce, under penalty of law, all of his business and personal records for a four-year period.

It is petitioner's contention that (A) the compelled production of his private papers was tantamount to a search and seizure restricted by the imperatives of the Fourth and Fifth Amendments as enforced against the States through the Fourteenth; (B) the broad and sweeping subpoena with which he was served constituted a general and roving search expressly prohibited by the Fourth Amendment as enforced against the States through the Fourteenth; (C) his compliance with the subpoena did not constitute consent to the broad search, nor waiver of his constitutional rights.

---

[20] *Abel* v. *United States*, 362 U.S. 217, 242 (1960) (dissenting opinion).

A.

**The subpoena was tantamount to search and seizure.**

While a great many of the cases which have delineated the law of search and seizure have been cases involving forcible physical searches by policemen, either with or without judicial warrants, it cannot at this late date be denied that compulsory production of private papers by legal process is equivalent to, and treated for constitutional purposes as, a search and seizure. *Boyd* v. *United States*, 116 U.S. 616 (1886); *Essgee Company of China* v. *United States*, 262 U.S. 151 (1923). Similar treatment is afforded such compulsory production by subpoenae *duces tecum*. *Essgee Company of China* v. *United States, supra.* And the fact that the papers whose production is thus compelled belong to an individual rather than a corporation requires the particularly unrestricted application of the protections of the Fourth and Fifth Amendments. *Essgee Company of China* v. *United States, supra.*

B.

**The broad subpoena was a roving and general search.**

The Fourth Amendment expressly prohibits searches without warrants "*particularly describing the place to be searched,* and the *persons or things to be seized.*" This language has its roots in this country's origins. The founders were all too acutely aware of the evils of the general warrant and the writs of assistance.[21]

As a consequence of this historical development, the explicit command of the Fourth Amendment and the im-

[21] For a historical account, see *Henry* v. *United States*, 361 U.S. 98, 100-101 (1959) and *Harris* v. *United States*, 331 U.S. 145, 157-163 (1947) (dissenting opinion).

peratives of a free society, this Court has frequently and resolutely set its face against general or roving searches. *Marcus* v. *Search Warrant*, 367 U.S. 717 (1961). See also Justice Butler's strong language in *Marron* v. *United States*, 275 U.S. 192, 195-196 (1927):

> "General searches have long been deemed to violate fundamental rights. It is plain that the [Fourth] Amendment forbids them . . .
>
> "The requirement that warrants shall particularly describe the thing to be seized makes general searches under them impossible. . . ."

In the instant case, the Judical Inquiry used a broad subpoena *duces tecum* as a dragnet to ensnare all of petitioner's business and personal records over a four-year period, without regard to possible relevance to the subject of the investigation, and to sift out at its leisure the tasty and incriminating morsels of evidence it had trapped. Never has there been such a classic example of a general and roving search, nor such a pristine demonstration of the patent unfairness of such a procedure.

C.

**Petitioner's compliance with the subpoena was neither waiver of constitutional rights nor consent to search.**

It is readily apparent that a valid waiver of rights or consent to search can operate only under circumstances where a conscious, volitional choice, free of duress or official pressure, may be made. To this end the courts have always been sensitive to the distinction between waiver of constitutional rights and bare submission to authority[22] in their effort to "indulge every reasonable presumption against waiver of fundamental constitutional

[22] *Johnson* v. *United States*, 333 U.S. 10 (1948); *Amos* v. *United States*, 255 U.S. 313 (1921).

rights." *Johnson* v. *Zerbst,* 304 U.S. 458, 464 (1938), quoting in part from *Aetna Ins. Co.* v. *Kennedy,* 301 U.S. 389, 393 (1937).

For this reason a person under the compulsion of a subpoena cannot be deemed to have given consent to a search. *Nelson* v. *United States,* 208 F. 2d 505 (D.C. Cir. 1953), *cert. den.* 346 U.S. 827 (1953).

Quite apart from these general considerations, petitioner was placed in an impossible dilemma when he received the broad subpoena *duces tecum* of the Judicial Inquiry. He knew that the Inquiry was investigating his alleged professional misconduct as part of its general investigatory scheme; he knew that his refusal to cooperate fully with the Judicial Inquiry by fully disclosing all information it sought, might well be grounds for disbarment or discipline for such failure to disgorge. *Re Cohen,* 199 N.Y.S. 2d 658 (1960), *affirmed Cohen* v. *Hurley,* 366 U.S. 117 (1961); *In re Anastaplo,* 366 U.S. 82 (1961); *Konigsberg* v. *State Bar of California,* 366 U.S. 36 (1961).

Recognition of the dilemma in which petitioner found himself, and reference to the many occasions in the record in which petitioner sought to assert his constitutional right to protect the private papers which were the subject of the subpoena, lead ineluctably to the conclusion that petitioner neither consented to the search nor waived any of his constitutional rights regarding his private papers by complying with the express and compelling language of the subpoena *duces tecum* served upon him by the Judicial Inquiry.

## IV.

Petitioner further contends that the compulsory production of his books, records and private papers pursuant to subpoena *duces tecum* was a seizure of his private documents—documents which were neither contraband, instrumentalities, nor fruits of crime—for the purpose of using them as evidence.

It has long been established that, by the intertwined effect of the search and seizure restrictions contained in the Fourth Amendment and the self-incrimination prohibition of the Fifth, the compulsory seizure of private papers which are neither contraband, instrumentalities nor fruits of crime is constitutionally prohibited. *Boyd* v. *United States,* 116 U.S. 616 (1886); *Entick* v. *Carrington,* 19 Howell's State Trials 1029 (1765); *Gouled* v. *United States,* 255 U.S. 298 (1921).

In the instant case, the financial records, check books and business records which were seized by the Judicial Inquiry could by no flight of imagination be regarded as contraband; they were records which petitioner as a lawyer and a private citizen was entitled to keep without violating any law. Neither were these records fruits or instrumentalities of any crime. See *Boyd* v. *United States,* 116 U.S. 616 (1886) (business invoices connected with the alleged fraudulent import of cases of plate glass, held: evidentiary); *United States* v. *Lefkowitz,* 285 U.S. 452 (1932) (bills, business cards, stationery, receipts, records, lists of names and addresses used in connection with illicit liquor business, held: evidentiary); *Freeman* v. *United States,* 160 F. 2d 72 (9th Cir. 1947) (stock record books, held: evidentiary); see also *Takahashi* v. *United States,* 143 F. 2d 118 (9th Cir. 1944); *In re Ginsburg,* 147 F. 2d 749 (2d Cir. 1945); *United States* v. *Lerner,*

100 F. Supp. 765 (N.D. Cal. 1951) (address book, held: evidentiary); *United States* v. *Thomson*, 113 F. 2d 643 (7th Cir. 1940); *Bushouse* v. *United States*, 67 F. 2d 843 (6th Cir. 1933). Consequently, the only conceivable use which could be made of the private papers whose production was compelled here was, as respondent's electic offering of such documents in evidence at the subsequent disciplinary proceeding amply demonstrated, solely as evidence of improper professional conduct sufficient to cause his disbarment. Such evidentiary matter is constitutionally immune from compulsory production or seizure even upon judicial warrant based upon probable cause. *United States* v. *Lefkowitz*, 285 U.S. 452 (1932).

Since the pertinent portions of both the Fourth and Fifth Amendments have become commands upon the states through the due process clause of the Fourteenth, *Mapp* v. *Ohio*, 367 U.S. 643 (1961) and *Malloy* v. *Hogan*, — U.S. —, 84 S.Ct. 1489 (1964), the compulsory production of the petitioner's private papers by an arm of the State of New York for use as evidence against him in a subsequent disbarment proceeding renders the entire state proceedings below constitutionally defective.

## V.

Quite apart from the illegal search and seizure of evidence discussed in Arguments III and IV above, petitioner contends that the refusal of the prosecutory and judiciary organs of the State of New York to return petitioner's private papers to him, after timely demand, during the three-year interval between the time they were originally subpoenaed in November, 1957 and the disciplinary hearing in December, 1960, was a denial of due process of law under the Fourteenth Amendment which independently invalidates the proceedings below.

It is too late in the day to deny that a person charged with an act which involves either punishment or forfeiture must, as a matter of due process, have an opportunity to prepare and be heard in his own defense. *In re Oliver,* 333 U.S. 257 (1948). As a part of the preparation of a defense, the right to discover and inspect documents, even those which result from the work-product of the adverse party, is a matter of grave importance. *Roviaro* v. *United States,* 353 U.S. 53 (1957); *Jencks* v. *United States,* 353 U.S. 657 (1957).

And the right to an opportunity to prepare a defense obtains in non-criminal administrative proceedings as well as in criminal cases. *Greene* v. *McElroy,* 360 U.S. 474 (1959).

But a more compelling case for full disclosure than the case at bar can hardly be imagined; for here all the petitioner sought was the return of *his own private papers* so that he might prepare a defense against the charges based upon these documents. And for three years petitioner was met with consistent and arbitrary judiciary and administrative refusal to comply with this most basic and proper request. If, in response to an accusation, the right to prepare a defense has any meaning at all, this case requires reversal.

## VI.

Lastly, petitioner contends that the finding against him for perjury—a charge which had never been presented to him in advance of the hearing, against which he never had an opportunity to interpose a defense, and of which he learned for the first time in the Report of the Special Referee after the hearing—was a denial of due process of law under the Fourteenth Amendment which independently invalidates the proceedings below.

One of the essential elements of due process of law is the right of an individual to have reasonable notice of a charge against him sufficiently in advance of trial so that he may have an opportunity to adequately prepare a defense. *In re Oliver*, 333 U.S. 257 (1948). And this principle is equally well established in non-criminal administrative proceedings. *Greene* v. *McElroy*, 360 U.S. 474, 497 (1959). Moreover, where the finding against the accused is that he has given false testimony before the court, such a finding in the absence of a prior charge against him which he had an opportunity to defend, is a denial of due process of law. *In re Oliver, supra.*

Nor need petitioner demonstrate prejudicial error by proving that he would not have been disbarred but for the perjury finding without prior notice, even though a sound argument may be made on this point.[23] For where unconstitutional procedure has tainted a hearing or trial, the test of reversal is not whether there was sufficient basis to support the result, apart from the constitutionally polluted procedure, but rather, whether there is a *reasonable possibility* that the unconstitutional procedure *might have contributed* to the result. See *Fahy* v. *Connecticut*, 375 U.S. 85 (1963).

This broad test of reviewability is clearly met in the case at bar. A finding that petitioner had been guilty of perjury at his own disciplinary hearing might well have meant the difference between complete disbarment and less drastic disciplinary action, or none at all.

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[23] Since the corroboration which the Referee found necessary to establish the third charge of subornation resulted from the fourth finding that petitioner committed perjury himself, it is clear that these two charges, at least, are inextricably intermingled for purposes of this petition. Inasmuch as the crucial findings of the Special Referee (Report, pp. 60-61) indicate that "I should add that if Items 1 and 2 above were alone involved I would recommend that the punishment to be imposed upon [petitioner] be a severe censure," the importance of the fourth adverse finding as affecting petitioner's disbarment is readily apparent.

## Conclusion

Petitioner has pointed out a number of areas in which his rights as a private citizen were emasculated in the disciplinary proceedings which resulted in his permanent disbarment from the practice of law in the State of New York. The zeal of the administrative and judiciary personnel of the State of New York to protect the public against unprofessional conduct of lawyers is highly commendable. But they must, in the process, understand that:

> "A bar composed of lawyers of good character is a worthy objective but it is unnecessary to sacrifice vital freedoms to obtain that goal."[24]

Grant of certiorari in this case by this Court will accelerate such understanding.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

BERNARD A. BERKMAN,
*Counsel for Petitioner.*

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[24] *Konigsberg* v. *State Bar of California*, 353 U.S. 252, 273 (1957).

## APPENDIX A

BY MAIL

THE PEOPLE OF THE STATE OF NEW YORK

To:

DAVID GOLDNER
401 Broadway
New York, N. Y.

GREETING:

WE COMMAND YOU, That all business and excuses being laid aside, you appear and attend before HONORABLE GEORGE A. ARKWRIGHT, a Justice of the Supreme Court of the State of New York, at an ADDITIONAL SPECIAL TERM OF THE SUPREME COURT FOR THE COUNTY OF KINGS, at Room Number 301, 3rd floor, Borough Hall, Court and Joralemon Streets, in the Borough of Brooklyn, City and State of New York, on the 20th day of November, 1957, at 10:00 o'clock, in the forenoon, and at any adjourned date to testify and give evidence in a certain proceeding now pending in the said Court, then and there to be conducted, consisting of a Judicial Inquiry, pursuant to order of the Appellate Division of the Supreme Court of the State of New York, for the Second Department, dated January 21, 1957, as amended, with respect to all matters relative thereto, and that you bring with you, and produce at the time and place aforesaid,

1. Day Book (reflecting daily receipts)
2. Cash receipts book
3. Cash disbursements book
4. Petty cash book
5. Petty cash vouchers
6. General Ledger and General Journal

7. Cancelled checks and bank statements for personal account, regular account, special account, closed and current, check books
8. Savings Bank, Savings and Loan Association and/or any other Depository pass book, closed and current
9. Record of stock investments, U.S. Savings Bonds, mutual investment fund and/or any other similar investment
10. Payroll Records:
    (a) Payroll Book and Social Security Tax and Withholding Tax returns
11. And any and all financial records pertaining to your business and/or person not itemized above, including Federal and State income tax returns for the period January 1, 1953 to December 31, 1956,

now in your custody, and all other deeds, evidences and writings, which you have in your custody or power, concerning the premises, and for a failure to attend you will be deemed guilty of contempt of Court, and liable to pay all damages sustained thereby and forfeit FIFTY DOLLARS in addition thereto.

WITNESS, HONORABLE GEORGE A. ARKWRIGHT, one of the Justices of said Supreme Court, presiding at the said Additional Special Term thereof, at said Borough Hall, Court and Joralemon Streets, Borough of Brooklyn, City and State of New York on the 15th day of November, 1957.

JOSEPH B. WHITTY
Clerk

DENIS M. HURLEY
Counsel for the Judicial Inquiry
Room 301, 3rd floor
Borough Hall
Court and Joralemon Streets
Brooklyn 1, New York

IT IS HEREBY STIPULATED that, the above matter having been adjourned to the day of 195 , the undersigned Witness is hereby excused from attending on said date but agrees to remain subject to the call of the Counsel for the said Judicial Inquiry.

Dated: 195

.....
Witness

.....
Counsel for the Judicial Inquiry

Endorsement pursuant to Civil Practice Act §403-a:

The Witness is Bound by this Subpoena to appear at the hearing or examination and at any adjourned date thereof.

# APPENDIX B

(A)*

## Report and Recommendations

SUPREME COURT : STATE OF NEW YORK
APPELLATE DIVISION : SECOND DEPARTMENT

In the Matter of the Petition of,
EDWARD S. SILVER,
Petitioner,
against
DAVID A. GOLDNER,
Respondent.

## INDEX


| | | |
|---|---|---|
| Witnesses, testimony of | | |
| Generally, | | Index A, p. 1 |
| Goldner, David A. | | Index A, pp. 2-5 |
| Exhibits | | |
| Petitioner's | | Index B, pp. 1-2 |
| Respondent's | | Index B, pp. 2-3 |
| Chart | | |
| Clients, attorneys, doctors, accident and closing dates | | Index C |
| Report | PETITION. PAR. | PAGES |
| Prefatory statement | | 1- 2 |
| Medical bills, etc., exaggerated, | 7a to 7j | 2-13 |
| Physicians' fees, agreement to pay | 7k to 7-o | 13-16 |
| Expenses, false representations as to, | 7p | |
| General outline | | 16-22 |
| Dascoli, Dominick | | 22-24 |
| Luckman, Stanley | | 24-27 |


* References are to original pagination.

| | | |
|---|---|---|
| Campbell, John | | 27-29 |
| Zucker, Gilbert | | 29-31 |
| Groeger, Ralph | | 31-33 |
| Summary comment | | 33 |
| Collateral transactions Generally | | 34-35 |
| Borsack, Hyman | | 35 |
| Gart, Stanley | | 35-36 |
| Granat, Ned | | 36-37 |
| Schmidt, Max | | 37-38 |
| Income-tax evasion | 7q | 38-40 |
| Bills of particulars, false | 7-r | 40-43 |
| Solicitation | 7-s | 43-46 |
| Statements of retainer, false, filing of | 7-t | 46 |
| Statements of retainer, failure to file | 7-u | 46 |
| Settlement-statements— | | |
| Failure to provide clients with, | 7-v | 47 |
| Failure to file with Appellate Division | 7-w | 48 |
| Fees, division of, with other attorneys | 7-x | 48-49 |
| Conflicting interests, representing clients with | 7-y | 49-51 |
| (B) | | |
| Fees, division of, with laymen | 7-z | 51-53 |
| Perjury, subornation of, (Judicial Inquiry) | 7aa | 16-22 54-57 |
| Impeding justice (Judicial Inquiry) | 7bb | 58 |
| Perjury, subornation of (trials of actions) | 7cc | 58 |
| Respect for courts, attitude of, failure to maintain | 7dd | 58 |
| Expenses of litigation, agreement with clients to bear, | 7ee | 58-59 |
| Statements, exaggerated, use in prosecution of claims, | 7ff | 59 |
| Claims, grouping of, | 7gg | 59 |
| Conclusions and recommendations | | 60-61 |

(1)

# INDEX A


| Witnesses | Record, Pages |
|---|---|
| Atkinson, Chas. | 771-773 |
| Bernstein, Lewis G. | 415-421 |
| Borsack, Hyman | 378-385 |
| Buscemi, Wm. V. | 7-75 |
| Campbell, John | 361-364 |
| Dascoli, Dominick | 145-164 |
| Dwyer, Robert A. | 411-414 |
| Garnier, H. J. | 101-109 |
| Gart, Stanley. | 313-324 |
| Goldner, David A. (cross, 597) | 425-758 |
| Gordon, Alexander E. | 210-281 |
| Campbell—234-241 (cross—277) | |
| Dascoli—224-234 (cross—272-277) | |
| Groeger—241-246 | |
| Luckman—246-247 (cross—277) | |
| Zucker—214-224 (cross—277-281) | |
| Granat, Ned | 324-340 |
| Groeger, Ralph E. | 365-375 |
| Ketcham, Harry | 195-200 |
| Luckman, Stanley | 181-189 |
| Mattison, Wm. C. | 388-411 |
| Michele, Arthur A. | 421-424 |
| Piscardi, Robert | 189-194 |
| Ray, Louis, M.D. | 113-144 |
| Schissel, Francine | 767-771 |
| Schmidt, Martha | 86-92 |
| Schmidt, Max | 78-86 |
| Siken, Leon | 302-311 |
| Stein, Jack | 340-360 |
| Stellwagen, Howard | 759-767 |
| Tanzer, Daniel | 776-781 |
| Tendler, Jack, M.D. | 165-181 |
| Weiss, Morris (withdrawn) | 376-378 |
| Zucker, Gilbert | 281-301 |

## INDEX A (Cont'd)

### GOLDNER—TESTIMONY

Direct

| | |
|---|---|
| Buscemi, Gilliberti & Siken | 425-443 |
| Schmidt—"Sprower" (Sprauer) | 444-447 |
| Buscemi—Doctor's bills | 447-449 |
| Dascoli (Valerie Neville, 460) | 449-463 |
| Custom on settlement | 451 |
| Luckman | 463-470 |
| Ketcham | 470-471 |
| Zucker | 471-480 |
| Gart | 480-485 |
| Granat | 485-489 |
| Obstr. Justice? | 490-492 |
| Stein, Jack—bp | 492-493 |
| Campbell, John | 493-497 |
| Zucker—Sharing expenses | 497 |
| Groeger | 497-501/589 |
| Borsack (yellow-sheet recd., 700-701) | 590-591 |
| Citroen (Zucker) | 479-480 |

Cross

| | |
|---|---|
| Business, bulk of | 597 |
| Yellow-sheets—given to clients | 606 |
| Public Adjusters | 607 |
| Citroen | |
| The "Esq." checks | 620-622 |
| Doctors | |
| Referrals—Gardstein, Ray, Tendler, Cohen | 624-625 |
| Sharing expenses or reducing fees? | 625-632 |
| Fee-sharing, denied | 632 |
| Gratuities, denied | 633 |
| Referral—Dr. Feder | 633-634 |

(3)

## INDEX A (Cont'd)

### GOLDNER—TESTIMONY


Cross (cont'd)

Buscemi
- Conflict of interest? 636-661
- Bp—loss of time & med. bills 661-663
- Fee-waiver 663-665
- suggestion of suborn.—den.— 665-667

Schmidt
- 2 checks 668-672 676-679

Conrad, Allstate & Sprauer 673-675
- Tendler's bills 674
- Payment den. (except a report) 675
- Procuring falsity, den. 675-676

2 Checks—Credibility Probe
- Cashing, custom & use 676-678
- Client—Motivation 678-680
- Delay in cashing 679
- Smaller check always cashed 680-681
- Prime check also cashed (Schmidt) 682
- Dascoli (Valerie Neville) 682 683, 690
- Delay & place of cashing 684-687

Smaller checks—proceeds of,
- Receipt, den. 687
- Payments to insurance personnel, den. 687-688
- Income Tax Evasion, den. 687-688

Dascoli
- Conrad referral 688-689
- Check-proceeds, receipt den. 689-690
- Marcus item—explan. 691
- Suborn. perj.—den. 692-698

## INDEX A (Cont'd)

GOLDNER—TESTIMONY

Cross (cont'd)

"Second-Checks" generally, receipts, denial of, reiterated 698-699

Borsack (Yellow-sheet recd.) 701

(4)

Stein
- Bp 702-704
- Obstr. Jstc. 704-705
- Gartstein bill 705-706

Castoro, Michael
- Cohen referral 706
- Allstate employment, knowledge of? 706-707
- How they first met? 708-709
- Other referrals
  - Fuschetto & Marzano (Ketcham) 709
  - Jennie Pagano 712-713
  - Helen Thompson 713
- Fees to,
- Generally half, but flexible 710-711
- Shared work & responsibility 713-714
- How did Castoro meet the clients? 716

Luckman
- $900 check explained 716-717
- Differential in expenses, explained (Yellow-sheet vs. Ledger) 717-720
- Suborn. perj. den. 720-721

Zucker
- Yellow-sheet rec'd. 721
- Just what fee did Goldner get? 721-728
- $1,000 check—recpt. of proceeds, den. 727-728

## INDEX A (Cont'd)

GOLDNER—TESTIMONY

Cross (cont'd)

Citroen
- 4 checks paid to him 730
- Stipulation 773-775
- One 10% (Groeger) 737-738
- Not employed in Campbell 733
- Always paid out of Goldner-share 733
- Never worked in court-room 758

(5)

Other 10% arrangements 736, 745-746

Campbell
- Proceeds of check went to client 732-733, 739-740
- What the J.I. told Campbell about the doctors he didn't see 739
- Granat—Suborn. Perj. den. 740
- Groeger—
  - Small check was for p.d. (no fee on it) 742
- The Esq. checks that weren't "Esq." checks 744
- Other checks—(Clients want the strangest things) 753-757

(1)

## INDEX B

### Exhibits

| Petitioner # | Item | Marked Page |
|---|---|---|
| 1 | Buscemi & Nassau Air Cond Bp—copy Original | 26 |
| 2 | Transcript—proceedings—Benjamin, J. (deemed marked) (subject to striking) (not in file) | 112 |
| 3 | Buscemi—Dr. Ray's report & Cards, to Colby | 122 |
| 4 | Buscemi—Dr. Ray's office cards | 123 |
| 5 | Dascoli—check for $3,000 | 151 |
| 6 | Dascoli—check for $500 | 151 |
| 7 | Dascoli—retainer | 162 |
| 8 | Schmidt—Tendler report | 177 |
| 9 | Luckman—check—$2,178.50 | 185 |
| 10 | Luckman—check—$900.00 | 185 |
| 11 | Ketcham, Samuels v—Allstate File | 193 |
| 12 | Ketcham v Samuels—Allstate File | 193 |
| 13 | Fuschetto et ano v Samuels, S & C | 194 |
| 14 | Ketcham v Samuels S & C | 194 |
| 15 | Goldner—ledger | 212 |
| 16 | Citroen—check to (Groeger) $500.00 (foto copy) | 245 |
| 17 | Zucker—check—$2,983.50 (both) | 285 |
| 18 | Zucker—check—$1,000.00 | 287 |
| 19 | Gart—check—$829.60 | 320 |
| 20 | Gart—check—$200.00 | 322 |
| 21 | Granat—check—$800.00 | 326 |
| 22 | Granat—check—$200.00 | 328 |
| 23 | Goldner—letter to Stein, re J.I. subp | 356 |
| 24 | Stein v Goldberg—Bp—(copy) | 702 |
| 25 | Campbell—check—$3115 (foto copy) | 363 |

## INDEX B (Cont'd)

### Exhibits

| Petitioner # | Item | Marked Page |
|---|---|---|
| 26 | Campbell—check—$700 (foto copy) | 363 |
| (2) | | |
| 27 | Groeger—check—$2,193.00 | 368 |
| 28 | Groeger—check—$500.00 | 370 |
| 29 | Borsack—check—$1,951.00 | 382 |
| 30 | Borsack, Hyman & Ann—check—$390.00 | 382 |
| 31 | Borsack, Hyman—check—$600.00 | 382 |
| 32 | Citroen—check to—$700.00 | 617 |
| 33 | Conrad—"Esq." check to, $1,491.75 | 621 |
| (3 checks, one xbt) | $1,096.50 | 621 |
| | $2,251.25 | 621 |
| 34 | Buscemi—Siken letter to Nassau, etc. | 657-658 |
| 35 | Schmidt, Max—check—$680.00 | 668 |
| 36 | Schmidt, Max & Martha—check—$870.00 | 668 |
| 37 | Citroen, check to, $950.00 (foto copy) | 730 |
| 38 | Citroen, check to, $575.00 (foto copy) | 730 |
| 39 | Citroen, check to, $700.00 (foto copy) | 730 |
| 40 | Citroen, check to, $500.00 (foto copy) | 731 |

### Respondent

| | | |
|---|---|---|
| A | Buscemi—Retainer (Goldner) | 68 |
| B | Zucker—affidavit (11/19/58) | 301 |
| C | Groeger—MVB report | 371 |
| D | Groeger—picture (car) | 374-375 |
| E | Groeger—picture (car) | |
| F | Mattison—letter to J I re: subps | 390-391 |
| G | *Granat—check—(Goldner) to Bernstein* | 416 |
| H | *Buscemi—Levine & B—letter to Siken* | 436 |

## INDEX B (Cont'd)

### Exhibits

### Respondent

| Respondent # | Item | Marked Page |
|---|---|---|
| I | Dascoli—yellow sheet | 461 |
| J | Luckman—yellow sheet | 468 |
| K | Gart—yellow sheet | 483 |
| (3) | | |
| K-1 | Zucker—yellow sheet | 721 |
| L | Granat—yellow sheet | 490 |
| M | Campbell—yellow sheet | 494 |
| N | Groeger—Conrad retainer | 499 |
| O | Groeger—yellow sheet | 501-589 |
| P | Borsack—yellow sheet | 701 |
| Q | 30 checks (not "Esq.") | 744 |
| R-1 & 2 | Sabinsky (2 checks) | 753 |
| S-1, 2 & 3 | Diaz—Brown (3 checks) | 753-754 |
| T-1, 2 & 3 | Simon—(3 checks) | 754 |
| U-1 & 2 | Gottlieb (2 checks) | 754-755 |
| V-1, 2, 3 & 4 | Janesco (4 checks) | 755 |
| W-1, 2 & 3 | Lester—Savides (3 checks) | 755-756 |
| W-4 | Gerald Lester check | 756 |
| X | Seidner—check | 756-757 |
| Y | Charles Atkinson check | 762 |
| Z | Charles Atkinson check | 763 |

# INDEX C

| Client | Retained Attorney | p | Doctor | p | Dates Accident | p | Closing, etc. |
|---|---|---|---|---|---|---|---|
| Buscemi | Goldner | 8 | Ray | 9 | 3/31/51 | 7 | (Levine & Baker |
| Schmidt | Goldner | 77,87 | Tendler | 78 | 8/ 1/52 | 76 | 7/13/53 (PX 35,36) |
| Dascoli | Conrad | 145 | Marcus | 148 | 8/ 9/53 | 145 | 12/10/54 (PX 5,6) |
| Luckman | Goldner | 182 | No evdnc | | 1/ 7/53 | 181 | 6/9/54 (PX 9,10) |
| Ketcham | Conrad | 198 | Not involved | | 11/24/54 | 195 | Not involved |
| Zucker | Conrad | 282 | No evdnc | | 6/21/53 | 281 | 3/19/54 (PX 17,18) |
| Gart | Conrad | 315 | Unnamed | 316 | 1951-1952 | 315 | 1/27/53 (PX 20) |
| Granat | Goldner | 325 | No evdnc | | 1953 | 324 | 6/28/54 (PX 21,22) |
| Stein | Goldner | 340 | Gardstein | 704 | 1/14/54 | 340 | (Bp & sub perj |
| Campbell | Goldner | 361 | No evdnc | | 7/28/54 | 361 | 6/12/56 (PX 25,26) |
| Groeger | Conrad | 365 | No evdnc | | 2/12/54 | 365 | 9/8/54 (PX 28) |
| Borsack | Goldner | 379 | Unnamed | 384 | Dec. 1952 | 378-379 | 6/29/54 (PX 29,30) (PX 31) |

(1)

SUPREME COURT

STATE OF NEW YORK

APPELLATE DIVISION—SECOND DEPARTMENT

REPORT AND RECOMMENDATIONS

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In the Matter of the Petition of,

EDWARD S. SILVER,

Petitioner,

—against—

DAVID A. GOLDNER,

Responent.

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This proceeding was begun by service of a petition charging Respondent with various acts of professional misconduct, malpractice, fraud, deceit and conduct prejudicial to the administration of justice (Judiciary Law, Section 90). His answer is a general denial. The issues were referred to me as a Special Referee for hearing, report and recommendation. The hearing has been had and proof taken from both parties. A stenographic record of the proceedings, together with the exhibits offered and received, is submitted herewith.

At the commencement of the hearing, the taking of an oath by me as Special Referee was waived by stipulation. It was also stipulated that if it became impractical for me to make and file my report before the end of the year 1960, (when my designation as Special Referee would terminate) the submission would be deemed continued before me, despite the fact that I would then no longer be a Special Referee, and that my report might be made to this Court, in due course, in whatever official status I might then occupy.

The hearing before me was concluded December 7, 1960. The briefs of the respective parties were submitted to me in mid-January 1961. Since January 1, 1961 I have been a Judge of the County Court, Queens County. On March 3, 1961, this Court, made an order designating me as Acting Justice of the Supreme Court, and it is in that capacity that this report is being submitted.

(2)

Respondent was admitted to the practice of the law by This Court in June 1949. About a year later he commenced his own practice in an office in New York County and has since maintained one there, although in different locations. In January, 1957, This Court ordered an investigation into the conduct of attorneys and their associates and, as one of the results of the investigation conducted by that authority, Petitioner, as District Attorney of Kings County, was directed to and did begin this proceeding. The acts of misconduct specified in the petition are alleged to have occurred between the years 1950 and 1957.

Taken seriatim, and by reference to the numbered and lettered paragraphs of the petition they are, in substance:—

*7a to j*:— That between the years 1950 and 1957 Respondent conspired with each of five named doctors, to cheat and defraud insurance companies, and others, through the use of false and exaggerated medical bills and reports and that he, in furtherance of the plan, referred patients to each doctor for the purpose of securing from him false and exaggerated medical bills and reports, for the purpose, and with the ultimate intent of presenting them to various companies and of inducing them to part with money in reliance thereon. Petitioner's bill of particulars more precisely alleges (Paragraph 1 [d], in substance, that the bills were to be, and in fact were, false

and exaggerated in that they exaggerated the number of visits by each of the persons, also named in the bill of particulars (Paragraph [1-a]), to the respective doctors, thereby effectuating a corresponding, fraudulent increase in the amount of the medical charges for the doctor's services in the particular case.

(3)

The doctors, and the periods of their respective conspiratorial engagements with respondent, are alleged to be as follows:—

| | | |
|---|---|---|
| 7a-b: | Louis Ray | 1950 to 1957 |
| 7c-d: | Maurice Feder | 1953 to 1957 |
| 7e-f: | Henry F. Gardstein | 1953 to 1957 |
| 7g-h: | Jack Tendler | 1953 to 1957 |
| 7i-j: | Herbert A. Cohen | 1954 to 1957 |

At the conclusion of the hearing, Petitioner's counsel conceded that the Feder, Gardstein and Cohen conspiracies had not been established and, indeed, there is no proof that they ever existed. I THEREFORE RECOMMEND DISMISSAL of the specifications set forth in paragraphs 7c-d; 7e-f; and 7i-j of the Petition.

Nor, in my opinion, is the evidence sufficient to sustain the charges made in paragraphs 7a-b (Ray conspiracy) and 7g-h (Tendler conspiracy) and I THEREFORE RECOMMEND DISMISSAL of the specifications therein set forth. My reasons for those conclusions and recommendations follow.

Out of the medical personnel alleged to have been involved, only Doctors Ray and Tendler were called as witnesses. While their testimony, when taken with the other evidence in the case, amply justifies a conclusion that each exaggerated his medical report in one instance, neither gave testimony which would support a conclusion that respondent either counseled or procured the report to be exaggerated, or knowingly and intentionally forwarded or

caused it to be forwarded to the insurer with knowledge of its fraudulent character. Respondent denied implication in those or any other instances and his guilt in any case is not made out by the other evidence.

Of the nineteen lay persons named in the bill of particulars (as having been referred to the doctors) only nine were called to testify. Of these, there were three (John Campbell, (4) Ralph Groeger and Gilbert Zucker) who gave no evidence whatever, relevant to this branch of the case. A fourth (Stanley Gart) testified that his retained counsel (not respondent) referred him to a doctor, but went no further. A fifth (Hyman Borsack) testified that he and his wife went to a doctor (unnamed) recommended by respondent and that he (Borsack) neither received ("direct") nor ever paid a doctor's bill, but that was as far as he went. A sixth (Jack Stein), after giving some evidence in another area, invoked his privilege against self-incrimination when questioned as to whether he had spent, or told anyone he had spent, sums of money for doctor's bills. Respect for his privilege foreclosed further inquiry. Respondent's testimony revealed that Stein had been recommended to Doctor Gardstein by one of respondent's associates but, as noted at the outset, it is conceded that the alleged Gardstein conspiracy stands unproved. Of the remaining three witnesses, one, William V. Buscemi, gave testimony which, if credited, tends to connect respondent with a conspiracy involving Buscemi and Doctor Ray. The other two, Max and Martha Schmidt, gave evidence which established that Doctor Tendler had exaggerated the number of their visits to him. Concerning Buscemi, the words "if credited" are used in the fullest sense of their connotation.

He did not testify that there was any express agreement of the nature alleged in the petition and bill, nor did he circumstantially connect respondent, in the first instance, with an exaggerated report, forwarded by Doctor

Ray to the insurer, in February, 1952. (*1) Both respondent Doctor Ray (5) denied any such conspiracy. The components of its evidentiary foundation are:—(1) A glaring difference between the number of visits recorded on the doctor's office cards (fourteen) (*2) and the number appearing in the report sent to the insurer (at least sixty-nine); (2) the doctor's unconvincing explanation of the discrepancy (he couldn't find his records and anyhow, they were hodge-podge); (3) Buscemi's testimony [A] that respondent sent him to Ray, for treatment; [B] that in fact, he had visited Ray no more than ten times between 1951 and 1954; and [C] that when his case went to trial (April, 1955, Levine and Baker being trial counsel and respondent not participating), respondent suborned Buscemi to commit perjury as to the number of his visits to Ray and as to his loss of time and consequent loss of earnings. Thus, respondent's connection with the exaggerated report depends upon the worth of Buscemi's testimony that, on the trial, he committed perjury concerning the identical subject-matter, on the advice of respondent. In other words, the act of subornation is depended upon to justify an inference that respondent was connected with the false report, and culpably so, in the first instance. But nowhere in the case is there any evidence corroborating the word of the self-confessed perjurer and the charge of subornation cannot be maintained as a matter of law. And for the same reason, the instant charge cannot stand, since respondent is connected with the conspiracy only by this "rope of sand". The justice of the law is clearly demonstrated in this case, for Buscemi appears from the evidence to be a person who has little, if any, regard for the truth.

I am convinced that he perjured himself when he verified the bill of particulars in his action, alleging (6) that

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(*1) Petitioners Exhibit 3.

(*2) Petitioner's Exhibit 3.

he had been confined to home and bed for some four weeks immediately after the accident and had, consequently, lost some three weeks of earnings. He admitted that he perjured himself as to that on the trial, so the falsity is not in issue. But on the hearing, while he identified his signature to the bill, he denied recollection of having read or signed it. Yet he said that he never signs papers without reading them. He holds a degree as Bachelor of Science and Pharmacy and is, or was, a practising pharmacist. He refused to admit knowledge that he was *swearing* to the content of the bill but, reluctantly, admitted an awareness that he was *representing* the content to be true. A nice distinction, but purely conceptual.

In his testimony before me he admitted, in almost the identical words, that on the trial of his cause he had committed deliberate perjury, for the purpose of stealing money to which he knew he was not entitled. His claim that Respondent procured him to do so is met with a denial, but if the denial be insincere, it remains my opinion, on the evidence, that Buscemi's pose as a misguided innocent, perjuring himself at the trial:— " • • • only on the advice of counsel, my counsel • • •, is destroyed by evidence of earlier falsehoods, on the same plane, bespeaking a carefully conceived plan for perjury, thought out well in advance, and put into action by Buscemi himself.

The accident and injuries occurred March 31, 1951. On August 29, 1951, Buscemi was examined by Doctor Arthur A. Michele, a specialist (Orthopedic Surgery), to whom he had been referred by Doctor Ray. Doctor Michele testified at the hearing and of his credibility I have no doubt. He identified a written report of his findings, rendered to Doctor Ray on September 5, 1951. Among other things, it (*3) shows (7) that Buscemi gave his own case-history. In so doing, he stated that he had

(*3) Part of Petitioner's Exhibit 4.

come under Doctor Ray's care the day after the accident, that X-rays were taken and injections given, and "also *micro-wave* (*4) *treatments, once weekly up to and including the present time*". If true, that representation reflected at least twenty visits theretofore made by Buscemi to Doctor Ray. If false, it could either have been inadvertent or it could have been designed to serve a purpose and, of course, evidence of repetition of the act has a value in that area. It was repeated.

In January of 1954 he signed an application for life insurance. Among other things, he there stated that Doctor Ray *was treating* him for a disc-injury. In his testimony before me he agreed that the reference was to the same injury, sustained in the accident, and for treatment of which he had gone to Doctor Ray. But when asked if the latter was, in fact, still treating him therefor at the time of the application, Buscemi made another nice distinction. He could not remember, so he said, whether Doctor Ray was treating him *"right at that moment of time"*. If the implication (of continuity of treatment) in the application was false, Buscemi's persistence in falsehood negates the possibility of inadvertence and suggests a preconceived plan to defraud the insurer by falsehood, if possible, and by perjury, if need be. His prior consistent statements, if discovered (8) would give an insurer's counsel no material for impeachment. On the other hand, if the statement was true it, along with the

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(*4) Probably Doctor Michele's professional interpretation of what Buscemi told him. During the hearing, Buscemi spoke of "diathermy" and "heat" treatments.

The report discloses that the examiner found "signs suggestive of a herniated intervertebral disc and advised reexamination in six or eight weeks, as well as therapy. Another report, rendered October 16, 1951, shows that the reexamination was conducted October 15, 1951. (Part of Exhibit 4) This time, the patient said that since the last examination "he has attempted work of a limited nature" although he "has continued with his employment up to the present time." His "history and subjective complaints" were "indicative of a possible herniated itervertebral disc."

prior consistent statement, casts doubt upon his testimony that he visited Doctor Ray no more than ten times in the entire course of their doctor-patient relationship. One thing more.

During Buscemi's cross-examination on the hearing, it was developed that the major theme of a part of his trial-testimony was, in substance, that from the time of the accident, right up to the time of trial, he had been and was using, continuously, a drug called Tolerol (a pain-reliever), obtainable only by prescription. Before he became fully aware of the direction of the cross-examination, he was asked how long he would say that he took the medication. He answered that he couldn't recall exactly, but "I may have taken it *for three weeks,* and when the pain subsides, you stop taking it." When the cross-examiner charged Buscemi with perjury on his own initiative, he denied present recollection as to how long he had taken the drug and fell back upon the record of the testimony given by him at the trial:— *"If it is there, it's true."* He admitted, however, that Respondent had not spoken with him about that part of his testimony.

Petitioner places some reliance upon the fact that Respondent prepared (or was responsible for preparing), and served, a false bill of particulars in which Buscemi claimed an expense of $286.00 for medical services, etc. Respondent testified that he had no independent recollection of the matter but that, customarily, such information was obtained either from the client or the doctor. Petitioner's theory seems to be that bill enters the case on the (9) instant specification (it is elsewhere charged as a separate offense) as circumstantial evidence of respondent's connection with a scheme for exaggeration of the medical report later sent by Doctor Ray, to the insurer. But it is not shown that Respondent had anything to do with the concoction of the Ray report in the first instance, nor is it shown that Respondent knew, or should have known, that the matter set forth in the bill was false,

and he denies any such knowledge. Petitioner seems tempted to conclude the contrary because, three years later, the doctor's bill was comprised for less than half the amount that would have been his due for the number of visits therein listed. But the compromise does not justify any such conclusion with respect to Respondent.

First, there was nothing before Respondent, so far as the evidence shows, which should have excited suspicion of the information given him. At the lower, average office-fee mentioned by the doctor ($3.00), the sixty-nine visits would run $207.00. There were X-rays besides and, from the reports in evidence, it appears that Buscemi had been examined twice by Doctor Michele, and once by a Doctor Smith. Counsel would, in a personal-injury case, want and have knowledge of these things, so the facts at hand were not out of line with the amount claimed in the bill. And second, the compromise took place after other counsel had taken over and respondent was entirely out of the case.

During the trial, the presiding Judge evidently detected something amiss (Buscemi was undergoing cross-examination), counsel were called up by the Judge, there was some colloquy, Leon Siken (the attorney of record) was summoned and waived his fee and the case was settled. By direction of trial counsel, Buscemi paid Respondent nothing. Buscemi's (10) testimony before me was, that after the settlement, he paid one doctor (not naming him). Doctor Ray testified that he was paid $135.00, by an insurer's check, the bill being adjusted downward because Buscemi balked at the amount. The only discrepancy is in the date of payment, which must have been April or May of 1955 since the trial was under way on April 4, 1955. Doctor Ray's record shows that Buscemi paid the bill on May 19, 1954, but as already remarked, his records were not very well kept. At any rate, since Respondent had nothing to do with the compromise of the doctor's bill, its occurrence does not

betoken consciousness of falsity of the information on which the bill of particulars was prepared. Nor does it invite an inference that he was connected with any scheme to exaggerate the claim in the first instance or that he, with guilty knowledge, contrived to have the padded report sent to the insurer in the second instance. So much for the Ray conspiracy. Next to be considered is the Tendler affair.

The Schmidts and some of their relatives (Sprauer) were injured in an accident on August 1, 1952. It is not clear whether Respondent was retained directly, or whether the case was referred to him by a Leo or Leon Conrad, another attorney. Neither is it clear how Mr. and Mrs. Schmidt came to go to Doctor Tendler. At any rate, he treated them, although neither had a dependable recollection of the number of the visits. The husband said "maybe ten" but not thirty-one, and the wife said "ten times, no more", but certainly not forty-three. There was put in evidence a report written by Doctor Tendler on September 1, 1953 and thereafter forwarded to the insurer.

Tendler there certified that, between September 2, 1952 and July 1, 1953, Max Schmidt had visited him on thirty one (11) (specified) dates and Martha Schmidt on forty-three. He reflected his office-fee at five dollars per visit. There is no evidence that either of the Schmidts ever saw or even knew about this report. Neither paid the doctor's bill. According to Mrs. Schmidt, Respondent had told her that he would take care of it. Respondent testified that he did not confer with the doctor about the number of visits or the amount of his charges, that he had nothing to do with the preparation of the bills, knew nothing about their veracity and, when he received them for transmittal to the insurer, assumed them to be true. No other evidence contradicts him or suggests that he should have known that the bills were exaggerated. He testified that they were paid, by the insurer's checks, sent either to

the doctor or the clients, and that he got no part of the proceeds. And again, there is no evidence to the contrary. Doctor Tendler took the stand, took an oath and then, in my opinion, flagrantly violated it.

He "vaguely" remembered having treated the Schmidts, but didn't remember the details. However, he had "a record on every patient that I have seen". But he didn't have it with him. He identified his report on the Schmidts but couldn't remember who had asked him to prepare it nor where he had sent it. Normally, though (by extraction), such things would be forwarded to the attorney, in this case, Mr. Goldner. Tendler was paid for his services to the Schmidts directly, by check, from the insurer (Allstate). He did not rebate any part of the proceeds to Respondent. The amounts received (noted in red on the rear of two, and on the face of three of the bills) represented the fair and reasonable value of his services. But it was a "reconstructed" bill.

(12)

That is to say, he, having no record of the dates of the individual visits (by the Schmidts or anyone else) would have to get them from the patients. So he couln't tell whether the number was excessive and he had no recollection of the matter. As just hinted in this report, Doctor Tendler was a difficult witness. He leaned on "belief" and "thought"; he evaded until he was pinned down and an answer wormed from him; he vacillated and swung like a weather-vane, sensitive to what he thought was the wind-direction yet anxious to avoid being caught in the draft. There were few things of which he was positive. One was, that he was a busy man, couldn't take time to make records and didn't have records of the actual dates of his patients' visits to the office. He made all his charges after asking the patients to supply the number of their visits and he billed them on that basis. Of course, they didn't always give specific dates. In such cases, doctor

and patient would consult the calendar, the patient would indicate how many times he had visited in a given week, the doctor would pick out the dates in that week and that was how he arrived at his figures. Even in the Schmidt case, where his report was written a year after he first saw them (*5). He says his practice is a "peculiar type". Few will disagree. "I don't send bills to any of my patients. When they come in they will say 'Here is what I owe you' but I know it sounds screwy, but it just happens to be the truth". Petitioner's memorandum characterizes the testimony of this mock-witness as of "* * * strained * * * credulity, if not an outright lie." That is something of an understatement. He was a contemptuous, (13) craven perjurer. But casting out his testimony does not aid petitioner's case. The rejection of his lies does not supply evidence to the contrary of his false assertions. There is still unfilled the void that existed before he took the stand and, in all likelihood, yielded to a fear that the law would enmesh him. And well it might. That brings me to the next set of specifications, namely:—

7k to o: That Respondent recommended clients to Doctors Louis Ray (7-k), Maurice Feder (7-l), Henry F. Gardstein (7-m), Jack Tendler (7-n) and Herbert Cohen (7-o) and, in each case, agreed to and did pay the physician's fee, without reimbursement, in violation of Canon 42. In his bill of particulars, Peititioner alleges that the clients are the same as those named in the conspiracy charges (Par. 2-a); that they were referred to the doctors at or about the time of the retainer (Par. 2-b) and the sums paid the doctors are set forth in the form of grand totals for each year, from 1953 through 1956. The bill does not show what an individual doctor is alleged to have gotten in any one year, nor does it allege what sum any such doctor collected in the case of any particular client. And, the dates of respondent's alleged offenses not being

(*5) The Schmidts had testified and left before he took the stand.

alleged in the petition, it must be taken from the bill that they are claimed to have been committed in and between the years 1953 and 1957.

In my opinion these charges are not supported by the evidence. I THEREFORE RECOMMEND THE DISMISSAL of the specifications set forth in paragraphs 7-k to 7-o, both inclusive. My reasons are these.

(14)

The gist of this charge is the agreement to bear the expense, without reimbursement. Assuming, without deciding, that doctor's fees for treatment of the client's injuries are "expenses of litigation", the evidence does not show that Respondent agreed to or did pay them, without reimbursement, in any of the cases detailed by the bill of particulars. The persons whose testimony is depended upon are the same as those involved in the alleged conspiracies, and no others. But before considering their testimony, it should be remarked that evidence, independently of Respondent's testimony, confirmed a pattern of custom and usage whereby the medical bills were, in some instances, paid directly by the insurer and, in others, *through* Respondent, but not *by* him, in that he was expending trust moneys and not his own funds. Hence, evidence of a statement by him, to a client, that he would "take care" of a bill doesn't necessarily import an agreement to bear the expense without reimbursement. Conversely, evidence of actual payment *through* him does not necessarily evidence an act in accord with such an agreement. Both of these situations are presented by the evidence.

Doctor Ray testified that Respondent referred patients to him between 1951 and 1955, but specifically denied any agreement with Respondent for the payment of his fees for services rendered the clients. After a conference off the record, his answer to the question which elicited the testimony was stricken, the question was put again and the doctor refused, on constitutional grounds (self-incrimi-

nation), to answer. (15) He later testified that he was paid for his services to such patients, but not by Respondent. The only client named by him was Buscemi who, in his testimony, said that he had no recollection of any agreement with Respondent as to which of them would pay the doctor's bill. And, as previously noted, he also testified that the insurer footed the bill. Doctor Tendler, in his appearance on the stand, testified that Respondent paid the bills of the clients referred to him. Even if I believed him—and I do not—his testimony proves nothing in this case. Respondent is faced with specific charges involving named persons. Of those persons, only the Schmidts were named by Tendler as having been referred by Respondent. And the only evidence on the issue came from Mrs. Schmidt, who testified that Respondent had assured her that he would take care of the bill. But in the light of the other evidence as to the custom and usage, taken with Tendler's acknowledgment that, in fact, he was paid by the insurer, I do not regard Respondent's assurance as an agreement to bear the expense without reimbursement. As for the other six of the nine lay witnesses called to substantiate this charge, none testified to any such agreement or payment as here alleged.

In the John Campbell matter, an accountant testified as to the state of Respondent's financial record, and no assumption of the expense was reflected there. Respondent testified that he deducted all expenses before distribution and made no agreement with Campbell to share them. Campbell's testimony did not at all deal with this aspect of the case. The accountant also explored the matter of Ralph Groeger and found the expenses (16) charged off before the net was distributed. There was no evidence of assumption here and Respondent denied it. Likewise scrutinized by the accountant was the case of Gilbert and Gloria Zucker but here too, the expenses were charged off before distribution and Respondent so testified. In the cases of Stanley Gart, Hyman Borsack and Jack Stein,

the only evidence on the subject came from Respondent and it refutes the charge. Respondent was the one who idenified the doctor (Gardstein) in the Stein case and he testified, without contradiction, that Stein paid the bill himself, except for one report. Doctor Gardstein was not called. In some of these cases, items of expenses were paid *through* Respondent, but not without reimbursement. Hence, my conclusion that the charge cannot stand. The next charge is that Respondent practiced fraud upon his clients, i.e.,

7-p: That, to the detriment of his clients, Respondent, at divers times, falsely represented (to them) that he had expended various sums of money in the prosecution of their respective claims or suits and that he charged such sums, in whole or in part, to the clients, when, in truth and fact, the expenditures (claimed to have been made by him) were false and exaggerated. Petitioner's bill of particulars (Par. 3) confines the issue to five transactions which I summarize thus:—

(17)

| Client | Amount allegedly claimed (and deducted) | Alleged amount of actual expenditure |
|---|---|---|
| Dominick Dascoli | $ 500.00 | $119.50 |
| Stanley Luckman | 643.00 | 94.00 |
| John Campbell | 770.00 | 417.75 |
| Gilbert Zucker & Gloria Zucker | 1,033.00 | 328.80 |
| Ralph Groeger | 614.00 | 113.80 |

Petitioner's contention is, that in each case the fraud was perpetrated when respondent called the client in and distributed the proceeds of the settlement, and that the method was to issue two checks to the client's order. The larger (hereafter referred to as the "primary" check) was kept by the client, who received its proceeds. The other (to which I will refer as the "smaller" check) was handed

to the client who, in reliance on respondent's representation that it was "for expenses", endorsed and returned it to respondent. The contention is, that the client never got the proceeds of the check, but that respondent did, and that the representation was known by him to be false when he made it. Baldly stated, the charge is larceny by use of a false representation to the effect that expenses in the amount of the smaller check had actually been incurred in the client's interests and had either been paid or remained to be paid.

In my opinion the evidence does not sustain the offense charged and I THEREFORE RECOMMEND DISMISSAL of the specification alleged in paragraph 7-p of the Petition as particularized by paragraph 3 of the bill of particulars. My reasons follow.

Essential to guilt of the offense are the elements of representation, falsity, knowledge, intent to deceive and defraud, deception, reliance and the obtaining of the res with (18) intent to unlawfully deprive the owner thereof and to appropriate it to the use of the taker or another. In two of these cases there is failure of proof that the representation was made. In the other three, while there is evidence of an utterance, in the vein charged, the surrounding circumstances seriously question the existence of intent to deceive and defraud, actual deception and reliance. Or, to state the proposition more bluntly, no one was deceiving anyone else and the alleged "victims" weren't victims at all. They simply wanted to hear no evil and see no evil and, consequently, they didn't hear or see any. Or at least they wouldn't admit to it on the stand.

For proof of the representation, deception and reliance, as well as the detriment, Petitioner's case rests upon the testimony of the clients. For proof of the falsity, knowledge, intent, etc., it depends upon the testimony of an accountant who produced Respondent's records, including his ledger, and described, in some detail, his findings. The entries spanned the years 1953 to 1956, both inclusive, and

had been made on a cash-basis. In his examination the accountant had noted, on his worksheets, the gross amount of the settlement in each case and the manner of its distribution. In each case two separate sums were shown as paid to the client and they corresponded, respectively, with the amounts of the primary and smaller checks. In each case, specific items of expense were found to have been entered but, when added, did not correspond with the amount allegedly represented as having been deducted for "expenses" in the Dascoli, Luckman and Campbell cases. In the Zucker and Groeger cases the amounts exceeded those alleged to have been represented, and deducted. A part of the purpose of the accountant's analysis of the records had (19) been to determine whether or not the expenses of the case had been "taken off the top" and distribution made on the basis of the balance remaining. That would show whether, according to the records, the amounts deducted for expense were in agreement with the items of actual expense, verified by examination of the ledger. In the parlance of that branch of the profession, expenses are taken "off the top" when the amount of the expense is deducted from the gross amount of the settlement and the remaining balance is divided between client and attorney in accordance with the terms (percentage) agreed upon in the retainer. Under a fifty percent retainer, as in these cases, the balance would be distributed equally. On the other hand, the expenses are said to be taken "from the client" when the gross is divided according to the percentage agreed, and the expenses are then deducted from the client's share and returned to the attorney. In order to discover the system here used, the accountant "worked backwards". That is to say, he took the amount of the primary check and multiplied it by two. Then he subtracted the end result from the gross amount of the settlement. That was tentatively assumed to be the amount taken "off the top." That was checked by totalling the amounts shown as distributed and subtracting them

from the gross. If they agreed, the expenses had been taken from the top. In these cases, with errors which will be accounted for, they agreed. The expenses had been taken from the top and the distribution figures had been computed on the basis of the balance remaining. The distribution figures showed the amounts of the smaller checks as going to the clients.

But the clients firmly denied receiving those checks or their proceeds. Yet all had been paid by Respondent's bank (Merchant's Bank of New York) and were admittedly endorsed by the payees. All originals were without any such bank-stamps (20) as would signify that they had cleared through another bank indicating, thereby, that they had been presented directly to Merchant's. Dascoli's endorsement was followed by that of a Valerie Neville, admittedly employed by Respondent at the time. The Campbell original was not available and the photostatic copy does not show the reverse side of the check but there is no dispute that it was paid. The Luckman, Zucker and Groeger endorsements were followed by the inscription "OK for cash D.A. Goldner." The Groeger check was cancelled two days after its date, the Luckman and Zucker checks five days after, and the Dascoli check six days later. So much, for the time being, for the evidence of record. Some general observations should be made as to the witnesses.

The client-attitude was not such as might be expected of the victims of fraud. No one was hostile to Respondent and some attested their original and continuing confidence in the alleged wrongdoer. Respondent categorically denied having falsely represented and deducted the expenses, as charged.

In broad outline, his testimony was that the clients received and kept the smaller checks and kept their proceeds. He denied having received any part of the proceeds, except in one collateral instance (later discussed). In all but one of the cases he had taken the expenses from the clients, and he produced so-called "closing state-

ments" (to which I will hereafter refer as the "yellow sheets") which, he testified, were prepared by him at or about the time of distribution and place before the client, with an explanation of the figures. The clients could, if they chose, keep them. But they didn't. As for expenses shown on the yellow sheets, but not posted in the ledger, he testified that he "worked from the files". I take that to mean (21) that he was guided by memoranda on or in the file, or bills, on which he based the content of his yellow sheet. He didn't keep the ledger himself his accountant did. Where the sum of the primary and smaller checks exceeded the amount which, by his version, would have been the client's rightful share he had, for one reason or another, increased the client's share. As to why two checks instead of one (for the total claimed to have been given the client) he had various explanations not borne out by the clients nor by external circumstances. In some cases the clients were "hungary for cash" as soon as they endorsed the insurance-company check, but until it had cleared, the Respondent's check wouldn't be good for the total amount, so he gave the smaller check for immediate use, since he had enough to cover that one. It was to avert any such complication that the primary check was sometimes dated later than the smaller one. The "OK for cash" inscription was a requirement of his bank, to facilitate cashing by clients who didn't have adequate means of personal identification. An employee would accompany the client, identify him, and the bank would give the client the cash. It was for much the same reason, he speculated, that Valerie Neville had endorsed the smaller check after Dominick Dascoli. She was employed by Respondent at the time. She had, in all probability, gone with Dascoli to identify him. But she was not called as a witness nor was her absence accounted for and that was true of various other witnesses who might have substantiated Respondent's claims. Mr. Conrad (said to have attended the distribution in cases which

he had referred to respondent), was one of them. If he also is a target of investigation that fact was not made to appear of record and is not otherwise known to me. In none of the cases was the client confronted with the yellow-sheet in aid (22) of his recollection of the events at the time of settlement and distribution. In some, they were not cross-examined with reference to the claim later made by respondent, after they had left the Court. In one (Groeger) Respondent claimed that the smaller check had been given the client in accordance with a provision of the retainer, reading: "car damage $500.00 without fee" but the retainer was not used in cross-examination of the client, who had denied recollection of having asserted any claim for property damage. (His accident-report was put in evidence to show that he had.) In that setting, the evidence in the individual cases may be more briefly stated and is thus summarized:

## DASCOLI

*Dominick Dascoli*:—Testified, in substance, that when the case was settled for $6,500.00 Respondent explained how it was to be divided. Dascoli received $3,000.00 (primary) check and its proceeds; Respondent said that it represented Dascoli's share and that the difference of $500.00 was for expenses. Dascolli wasn't given an itemized list of the expenses, but believed Respondent and didn't question him. He was handed the smaller check, to his order, but endorsed and returned it. He did not, and does not, know Valerie Neville, whose endorsement appears below his, nor did she endorse the check in his presence. He was happy when he got his check. He made no complaint then that he was being "short-changed" and he makes no such complaint now. He originally retained Leo Conrad but all dealings thereafter were with Respondent.

*Respondent*:—Testified, in substance, that he didn't tell the client the expenses were $500.00; actually, Dascoli got $3,500.00 in Conrad's presence (and implicitly, at his suggestion) (23) after Dascoli complained about the expenses and about a loss of earnings on his part. Why two checks? To insure bank-clearance (as already outlined, ante). That was why the primary check was dated three days later than the smaller. The actual expenses were $250.00 (by reference to the yellow sheet). A bill of $100.00 for Dr. Marcus, not shown in the ledger, must have been omitted by oversight. It was deducted at the closing, but someone must have neglected to pay it.

*The ledger entries show*:—Settlement: $6,500.00: Distribution; to Dascoli, $3,000.00; to Conrad, $1,351.25; to Goldner, $1,648.75, which add up to $6,000.00, plus, to Dascoli, $500.00, for a total of $6,500.00. The items of expenses included $35.00 to Dr. Marcus (Dascoli's personal physician) and totalled $119.50.

*The yellow sheet shows*:—Fees, $3,250.00, expenses $250.00, deducted from the $3,250.00 for a balance of $3,000.00 to which is added $500.00 (with a note "adj lost salary") for a total of "$3,500—Dascoli." Among the items of expense was a $100.00 item for Dr. Marcus. No evidence of its payment was offered and Dr. Marcus was not called, though he is not named as having been connected with the alleged conspiracies of exaggeration.

It is a noteworthy circumstance that Mr. Dascoli is one of five men who assert that they accepted, without question, the meagre explanation allegedly given by Respondent for taking from them a substantial part of the proceeds of their respective settlements. I do not believe them. And when I get to the Luckman matter I will single out record-evidence which points the other way. But to return to Dascoli, his loyalty to Respondent went to the point of perjury at the Judcial Inquiry, in regard to the

smaller check, and committed in response to a request, by Respondent, that Dascoli lie about the matter. (24) Mr. Dascoli recanted and told the truth when shown the checks and threatened with prosecution, and after he had phoned his wife and talked it over with her. For a person of normal sensibilities, that must have been a harrowing experience, and, according to Dascoli, Respondent was the cause. Yet, unresentful, satisfied when he got his check, still satisfied and disavowing any thought that he was "short-changed", he remained loyal to Respondent at the hearing. Nor does it appear that he even knew Respondent until referred to him by Leo Conrad. Dascoli asserts that he was not, by his judgment, short changed. That, I believe. I conclude that if the words "for expenses" were used, they were "for the record" and nothing more, and that there was neither intention to deceive, nor deception, nor reliance upon that flimsy utterance. There was a meeting of the minds, but neither Dascoli nor respondent revealed the meeting-ground.

## LUCKMAN

*Stanley Luckman*: Testified, in substance, that after a settlement for $5,000.00 he took away a (primary) check for $2,178.50, but that was all he received. He endorsed and returned smaller check for $900.00 to Respondent; he didn't take it with him or receive any part of the proceeds; Respondent merely told him "there were certain expenses and that is all there was for me" and (in answer to a leading question) that he had taken the expenses "off the top." Luckman wasn't given an itemized statement and didn't ask for an explanation of the expenses. He retracted his testimony about any representation as to expenses and that they had been taken "off the top." "He just told me to do him a favor and endorse this check." Luckman didn't question why he couldn't take the smaller check with him. "At the time I was just glad the (25) case

was settled and * * * happy about the whole thing." He didn't ask what Respondent was going to do with the check. He had tried, unsuccessfully, to deal with the insurer himself, before retaining Respondent, but got a "run-around." When he received his (primary) check he was satisfied with that sum. There was no question in his mind as to expenses "off the top" and he recognized that, *whatever it was for,* it was a legitimate disbursement, to the best of his knowledge (he added).

*Respondent*: Denied falsely deducting expenses of $643.00 etc., and denied that the expenses were only $94.00. He testified, in substance, that, by reference to his yellow sheet, they were $321.50. Luckman actually got $3,078.00, through both checks, because he complained about his share. Two checks were issued because Luckman didn't want his wife to know (presumably, the amount he was really getting. "He had been seeing some girl."). He denied that he had asked Luckman to endorse and return the smaller check, as an accommodation. "* * * Mr. Luckman was a business man." The smaller check was Okayed for cash to facilitate cashing by the payee (same procedure as Dascoli).

*The ledger-entries show*: Settlement, $5,000.00: Distribution; to Luckman, $2,178.50; to Goldner, $1,921.50, which add up to $4,100.00 plus, to Luckman, $900.00, for a total of $5,000.00. The ledger-entries of items of expense might have covered two companion-cases and totalled $140.75, not broken down by the accountant.

*The yellow-sheet shows*:—expenses of $321.50, taken from the client's share. They include a total of $270.00 for enumerated items of medical expense. As to why his ledger showed only $35.00 to one of the doctors (Pomerantz) listed for $40.00 in the sheet, Respondent said that he had the bill before him when (26) he made the deduc-

tions and couldn't explain why he was paid less. As to the other doctors, not shown in the ledger, he was working from his files and knew they were paid. No receipted bills nor cancelled checks were offered and none of the doctors was called.

I have no doubt that Mr. Luckman was "happy about the whole thing"—after the amount of his primary check had been negotiated to his own satisfaction. But the record-evidence destroys the atmosphere of implicit trust and unquestioning confidence created by his testimony. Going back to the settlement figures, it is apparent that nine hundred dollars had been taken from the top and the remainder of $4,100.00 had been distributed, unequally. Luckman's share was $257.00 more than Goldner's and, of course, there must have been a reason. Upon the figures, one of two things happened. Either Luckman insisted upon another $128.50 and Goldner yielded the point, or Luckman made a bid for $257.00 and his claim was compromised by splitting the figure down the middle. If the first of these things happened, a sum of $128.50 would have been added to half the balance being distributed and would have been given to Luckman. The result would be $2,050.00 plus $128.50 or a total of $2,178.50, which is what Mr. Luckman got. To Goldner, the result would be $2,050.00 less $128.50, for a remainder of $1,921.50, which is what Respondent got. And, if the second thing happened, the figures would shape up the same way. "Mr. Luckman was a business man." That, I accept. I reject his assertion that he did not question the expenses, if the words "certain expenses * * * off the top" were used at all. I reject his testimony that he just did Respondent a favor and turned back the smaller check without any question as to why he couldn't have it for himself. I accept his acknowledgement that it was for a disbursement (not necessarily legitimate) and reject his implication that he did not actually know what it was for. I conclude that he just didn't disclose the extent of his

knowledge at the hearing. And neither did (27) the Respondent. It follows that there was neither intended deception, actual deception, nor reliance.

## CAMPBELL

*John Campbell:*—Testified, in substance, that after a settlement for $7,000, he received and deposited the primary check, but never received proceeds of smaller ($700.00) check which he endorsed and returned to Respondent. His testimony is more fully discussed after comment on the yellow-sheet.

*Respondent:*—Denied having represented or deducted $700.00 as expenses; he testified, in substance, that he didn't receive any part of proceeds of smaller check; it was issued because a girl mistakenly informed Campbell, by phone, that the case was settled for $8,000.00 and, when the client learned the correct amount he was disappointed. He complained that Goldner was winding up with a net fifty percent while he (Campbell) had lost $500.00 in car damage, in addition to loss of income (moonlighting fireman) so seven hundred dollars was added to his share, and that is what the smaller check was for. After Campbell had been to the Judicial Inquiry for the first time, he told Respondent that the latter had charged him for doctors he (Campbell) didn't remember seeing. Respondent explained that the doctors had reviewed his X-Rays. "He wasn't a fellow to part with any money without knowing about it."

*The ledger-entries show:*—Settlement: $7,000.00: Distribution; to Campbell $3,115.00; to Goldner, $3,115.00, which add up to $6,230.00 plus, to Campbell, $700.00, for a total of $6,930.00, leaving $70.00 unaccounted for.

*The yellow-sheet shows:*—expenses of $385.00, taken from the client's share.

Mr. Campbell was intelligent, alert on the stand, brief (not quite four pages), to the point and chose his words with care. (28) He was not cross-examined as to his principal or supplementary occupation, nor as to the sequel to his appearance at the Judicial Inquiry. Although, on first impression, his testimony suggests ignorance of the purpose of the "expenses" for which $700.00 was taken from him, it is consistent with knowledge of a specific purpose by a witness careful not to betray the fact unless forced to. With an alleged "ten percenter" figuring in the other charges in the specifications, the circumstance that the alleged "expenses" of $700.00 are exactly ten percent of the amount of the Campbell settlement has some significance in its setting. Now note Mr. Campbell's testimony. He wasn't "exactly" given an explanation or written statement as to how the amount of his (primary) check was computed. *As far as he knew,* it was for expenses. That is what he was told (in answer to a leading question). But if Mr. Campbell meant to convey the understanding that he was in ignorance of the reason why a substantial sum of money was taken from him, and that he let it go on the strength of a casual representation that it was "for expenses" I do not believe him. If the words "for expenses" were used, I do not believe that he was intended to be or that he was deceived thereby, nor that he relied on so skimpy an explanation.

He had been referred to Respondent, said Mr. Campbell, by a man down at the collision shop, so it was a first meeting and there was no past relationship, professional, or social, on which blind faith and confidence in the attorney might have rested. Seven hundred dollars is a lot of money in the lives of most of us and there is nothing to show that Mr. Campbell is more fortunate—or less prudent—than the rest of us. And a man of his intelligence and forethought, as evidenced on the stand, with a normal, prudent regard for his own interests, would ask for a more adequate explanation of the reason why he

was parting with one-tenth of his settlement, especially if, as Respondent testified, Campbell found it economically necessary or advantageous to pursue two gainful occupations. But if (29) Respondent told an untruth it remains my opinion that Mr. Campbell did not tell the whole truth which, of course, is much the same thing. I reject the suggestion of his testimony that he was in ignorance of and deceived concerning the purpose of the payment. And I reject Respondent's explanation of the payment.

## ZUCKER

*Gilbert Zucker*: (Gloria was his wife) Testified, in substance, that when the case was settled for $7,000.00 he received and got the proceeds of the $2,983.50 (primary) check but the smaller ($1,000.00) check he endorsed and returned to Respondent; he didn't receive its proceeds. He believed the computation was explained, but recalled no written statement. As to the primary check he "believed" the explanation was "this is the proceeds as a result of the case being settled * * *, words to this effect." and, as to the smaller check and why he had to endorse it over, "Well, something to the effect about bookkeeping. *I really wasn't interested at the time* * * *," He went on to admit perjury at the Judicial Inquiry, allegedly committed by Respondent's procurement.

*Respondent*:—Denied having falsely deducted expenses of $1,033.00 etc., and denied falsely representing the matter; the substance of his testimony was, that the actual expenses (with reference to the yellow sheet) were $516.50, since discovered to have been erroneous through duplication of an item of $190.00 for Dr. Feder; Zucker did not return the smaller check and Respondent got no part of its proceeds. It was given to increase the Zucker share

because Gilbert Zucker was a nephew of Sam Missler, who referred cases to Conrad, and Conrad (the attorney originally retained) agreed that the Zuckers would get an additional $1,000.00. Why two checks? He couldn't recall, but the talk about Missler (and some murmuring about the expenses) may have occurred after the primary check had been issued.

(30)

*The ledger entries show:*—Settlement $7,000.00: Distribution; to Zuckers, $2,983.50; to Conrad, $1,491.75; to Goldner, $614.75. plus, to Zucker, $1,000.00 for a total of $6,090.00 But in this case the figures show that *$1,033.00* had been taken from the top, leaving a balance of $5,967.00 for distribution. The Zucker (primary) check is fifty percent and the Conrad check is twenty-five percent of that amount. The ledger entries itemize expenses, totalling $1,033.00, as follows:—*Citroen* (the alleged "ten-percenter") *$700.00;* Dr. Cohen, $20.00; Dr. Feder, $190.00 and Goldner, miscellaneous, $123.00. Therefore, on the basis of the ledger entries, the computation must be made like this:—Settlement, $7,000.00, less $1,033.00 (expenses, actual) leaves a remainder of $5,967.00 distributed:—to Zuckers, $2,983.50; to Conrad, $1,491.75, which add up to $4,475.25 plus, to Zucker, $1,000.00 for a sub-total of $5,475.25, plus (all that was left), to Goldner, $491.75 for a total of $5,967.00. The amount of the difference between the fee booked by Respondent—$614.75—and the remainder left for him to get—$491.75—is $123.00, which is the exact amount of his miscellaneous expenses.

*The yellow sheet shows:*—expenses of $516.50, deducted from $3,500.00, with a remainder of $2,983.50, under which is the figure 1,000—with a note: "Clients Leo asked favor." No sum is earmarked for Citroen among those listed as items of expense.

This case brings to the forefront *one* reason for a conspiracy of silence which might well extend to and include the others. There is no evidence of any false representation as to expense. The testimony goes "* * * this is the proceeds * * * something to the effect about bookkeeping ***." The detached disinterest in the ultimate disposition of a thousand dollars;—" really wasn't interested at the time", is completely incredible. And the expenses of record were in excess of the $1,000.00 which Respondent is, in effect, charged with having stolen by the use of the false pretense that wasn't made. Among the expenses was an item of $700.00—ten percent (31) of the settlement—for Citroen. I do not believe that Mr. Zucker's knowledge of the bookkeeping was so limited as he stated in his testimony.

As for the respondent, his testimony is rejected. A blueprint is hardly necessary.

## GROEGER

*Ralph Groeger:*—Testified, in substance, that after a settlement for $5,000.00 he received a primary check for $2,193.00 and got the proceeds, but didn't get the proceeds of a smaller check for $500.00 which he endorsed and returned to Respondent. He "thought" Respondent wrote down an explanation and showed it to him. Although he was unable to recall the fact, his accident report (in evidence) claimed property damage of $500.00 and pictures (also in evidence) show extensive damage to the front end of his car.

*Respondent:*—Testified, in substance, that the client got a total of $2,698.00 by the primary and smaller checks. A notation on the retainer (of Leo Conrad) in the words: "car damage $500.00 without fee", led him to assume that the smaller check was given in accordance with that provision. And, because the smaller check was dated five

days (actually, six) before the larger, he must have issued it because the client wanted money right away.

*The ledger entries show:*—Settlement, $5,000.00: Distribution; to Groeger, $2,193.00; to Conrad, $1,096.50 and to Goldner, $710.50, which add up to $4,000.00, plus, to Groeger, $500.00, for a total of $4,500.00. But here again, a deduction of $614.00 must have been made from the top to arrive at a distributable balance of $4,386.00. Restoring and adding that amount would give a gross of $5,114.00. The error is accounted for by reference to the items of expense entered in the ledger. They are, Citroen (the alleged ten-percenter again) $500.00 and Goldner miscellaneous, $114.00. The amount of the excess is also the amount of Goldner's miscellaneous expenses. These were verified by the accountant as, actually, $113.80, in connection with which, note the content of

(32)

*The yellow sheet*: which shows itemized expenses of $113.80, not including nor reflecting any payment to Citroen. To the amount of $113.80 is added "car damage 500—" for a sum of $613.80, which is deducted from 5000—with a remainder of $4,386.20, which is divided by two. The notation continues like this:—

| | |
|---|---|
| " | 2198.10) |
| Car damage | 500—) Groeger" |

This is the only one of the five cases in which Respondent took the expenses from the top.

Aside from the obvious fact that the amount of the expenses exceeded the amount of the smaller check in this case, as in the preceding one, there is no evidence whatever of false representation as to expenses. The very first reference to the subject was made by Mr. Groeger when asked the terms of the retainer. He answered "fifty percent less expenses." He was then asked whether, when

he received the primary check, he requested Respondent to "explain what the expenses were." His answer: "I don't think I asked him; I think he explained it to me." Asked whether verbally or in writing, he answered: "I think he wrote it down and showed it to me, but I don't recall it exactly." That was the entire testimony on the subject, (33) and, of course, it does not make out a false pretense. I reject Respondent's testimony, and his yellow sheet, as untrue. The yellow sheet in evidence was not identified by Groeger as the one shown him. He was not asked about it on cross-examination.

## SUMMARY COMMENT

It must be evident, at this point, that I am convinced, by the evidence, that Respondent received the proceeds of these smaller checks, but not for his own use, and that the clients were aware of the purpose for which the money was to be spent. The word "bribe" was not used in cross-examining Respondent. He was asked about—but denied—the giving of gratuities in another connection. With specific reference to the smaller checks, the cross-examiner suggested—but Respondent denied—payments to Insurance Company adjusters or employees, in general. "Gratuities" is a polite word, "bribery" an ugly one. There is no evidence of the actual occurrence of either, but the image of Respondent, created by the evidence, is not that of an avaricious man. It is, rather, that of one who spent the clients' money for results. And the clients were grateful for the results and not at all disposed to question that there were obligations to be met.

(34)

BORSACK, GART, GRANAT, and SCHMIDT

Over the objection of Respondent's counsel, evidence of these transactions was received at the hearing. None of them is included in the charge of larceny by false pretense as narrowed in scope (to the five cases just discussed) by the bill of particulars. The evidence was received on the theory that evidence of similar acts is admitted as an exception to the general rule of exclusion when it has true probative value on a present issue, either of (1) the intent with which the act presently under consideration was done or, (2) whether the act was done in pursuance of a single, sustained and continuing scheme and plan. But to serve that purpose they must, of course, have a criminal complexion. Otherwise, they are not other "criminal acts" and contribute nothing to the proof. After reviewing the hearing-record, I am convinced that the other transactions are not themselves shown to have involved criminal conduct, and hence have no value as evidence. Consequently, they bring to the case only the impact of prejudice by suggestion, unproved. Were this a matter in which I had the power of determination, I would strike them from the record. But since my only function now remaining is report and recommendation, the evidence must remain in the record for review by the Court to which this report is rendered and my recommendations made.

For such aid as it may lend in the process of review, the evidence in each of these cases is tersely summarized. Here again, a note of factors and considerations (35) common to all will aid perspective and shorten my address. The accountant's testimony does not cover any of these cases. As a result, there is no evidence of the falsity of Respondent's representation in any case, if he made one and if it was false. Respondent's yellow sheets are in

substantial accord with his version of these matters and, as in the others, I reject his versions and his yellow sheets.

*Hyman Borsack*:—(Case also covered wife, Ann) Testified, in substance, that the case was settled for $5,500.00. Here two primary checks were issued and the proceeds received by clients. The smaller check for $600.00 was endorsed and returned to Respondent. The client didn't get the proceeds. As for the conversation concerning it:—"Well, he said it was for expenses." Another unperturbed and acquiescent victim.

*Respondent*:—Testified, in substance, that the client got and kept the smaller check, and he got no part of the proceeds.

*The yellow sheet*:—shows expenses of $154.00 taken from share of Ann Cohen (Borsack) on a claim settled for $1,000.00, with remainder of $346.00, apparently rounded out to $350.00, but her primary check (in evidence) was for $390.00; expenses of $299.00 taken from share of Hyman Borsack (settled for $4,500.00) with remainder of $1,951.00 and note "600— extra to HB." Hyman's primary check was for $1,951.00.

*Stanley Gart*:—Testified, in substance, that he retained Conrad but Respondent handled the matter; it was settled for $2,000.00 (actually, $1,995.00, per my examination of the ledger). He received the primary check of $829.60 (36) and its proceeds, but didn't remember a smaller check for $200.00, although he identified his signature (endorsement) and he didn't get the proceeds. He denied having received the smaller check as a result of a complaint by him, that the amount of the primary check wasn't adequate in view of his (Gart's) loss of earnings.

*Responent*:—Testified, in substance, that he received no part of proceeds of smaller check; it was given to Gart because he had had to wear a jaw-brace and had lost earnings; the different dates meant that there wasn't enough on deposit to cover both checks, etc.

*The yellow sheet*:—Shows settlement, $1,995.00; client's share $997.50, from which deducted expenses of $167.90; to remainder of $829.60 is added 200—with notation "To cover part loss earnings" after which total of $1,029.60 is struck. Mr. Gart either had a poor recollection or was a reluctant witness.

*Ned Granat*:—Testified, in substance, that he didn't remember the settlement-figure. His brother-in-law, Lewis Bernstein, who forwarded the case to Respondent, supplied it as $1,750.00. Granat testified that he received the primary check of $800.00 and its proceeds, but that after he endorsed the smaller check for $200.00, someone in the office took it back. He didn't get the cash. He admitted that he owed Bernstein some money but denied telling Respondent to turn the $200.00 over to Bernstein in payment of the debt. "The thing that I heard was it was additional expenses." He testified that Respondent asked him to lie about getting (37) the proceeds, at the Judicial Inquiry. The record shows that he perjured himself in the matter, but recanted. He was of sub-normal intelligence, a reluctant witness and of poor memory. He didn't remember the substance of his judicial Inquiry testimony though he had read it a week before the hearing.

*Respondent*:—Testified in substance, that Granat (as a result of suggestion by Goldner) said to turn the $200 cash over in payment of the Bernstein debt, and that he did turn it over, as authorized.

*Lewis G. Bernstein*:—Testified, in substance, that he forwarded the case to Respondent; there was a debt and

he mentioned it to Respondent when he sent the case along; after the settlement, Respondent did give him some cash with a remark indicating that it was against the debt (he also got a forwarding fee) but he wasn't sure of the amount. It might have been one or two hundred dollars.

*The yellow sheet*:—showed only expenses of $153.00, but not the alleged manner of distribution. Bernstein was interested in Granat through relationship, by affinity, and in Respondent, through profitable business (professional) dealings with him.

*Max Schmidt*:—(Case also involved wife, Martha.) Neither the Schmidts nor Respondent could recall the amount of the settlement. Mr. Schmidt's examination was conducted with proof of exaggeration of Tendler's medical report as the chief aim. When asked how much he got in settlement Mr. Schmidt, with pass-book in hand, said $970.00. But the primary check (38) was for $870.00. Asked whether he deposited "that check" Schmidt answered:—"I didn't have a check. Cash money." He identified his signature (endorsement) on the primary check. Asked whether he got $870.00 for it, he said: "I only got that money what I deposit in the bank. * * * $970.00. That is all what I remember." He also identified his signature (endorsement) on the smaller check for $680.00 but couldn't remember the conversation when he got it. As to whether he remembered receiving its proceeds:—"altogether what I could tell you here was $970.00 in cash money." And he too, was satisfied with the settlement.

*Respondent*:—Testified, in substance, that he couldn't recall the amount of the settlement, but the clients got both checks. He didn't get the proceeds of the smaller check: "Never had the money—never touched it."

*No yellow sheet* was offered in this case.

The next specification advances the second wave of the attack on the primary and smaller check device. It is thus alleged, in substance:

7-q:—That respondent, for the purpose of deceiving Federal and New York State Income Tax Authorities, at various times issued two settlement checks to each of his clients in payment of the latter's share of proceeds of litigation, or claims, but demanded and received from each such client the proceeds of one of such checks without declaring it as taxable income. Petitioner's bill of particulars specifies that the checks were issued at the time of settlement, that the proceeds were received by respondent, personally, (39) and through Valerie Neville Mangino, at his office or bank and (implicitly) that he failed to declare the money, so received, as taxable income for the year 1954, for which he declared a gross income of $54,821.78 but paid taxes on a (declared) net income of $1,793.71. (Par. 4-b, c, d.)

Respondent's counsel protests the consideration of this charge upon the ground that, prior to the taking of testimony at the hearing, there was a stipulation made between him and counsel for Petitioner, that the latter would be bound by the bill of particulars and that the income tax charge would be no part of the proof in this case. (Petitioner's Memo, page 21.) There is no such stipulation of record. There is colloquy about a representation made by the Petitioner's counsel, to that effect. It occurred on the objection of Respondent's counsel to the admission of the accountant's testimony as to the Zucker transaction, wherein the settlement and distribution occurred (by reference to the checks) March 19, 1954. Mr. Markowitz stated, in effect, that the proof was offered to illuminate the matter of the two checks and, on later objection, agreed that he had made a representation of the kind just noted. He then stated that

the purpose of the proof was to show the manipulation of the books. Looking back upon it, the stipulation, if in the terms employed by counsel, would be pointless, since the Petitioner's bill of particulars, as above summarized, charges the offense as having been committed in 1954 when, presumably, Respondent (40) got his fee in the Zucker case. So the proof was admissible under the bill. However that may be, the ultimate reality is, that there is no evidence whatever to support the charge. The income, as alleged in the bill, is not proved. The declarations (Federal and State) alleged in the bill are not proved. The evidence is insufficient to sustain the charge in any event.

I THEREFORE RECOMMEND DISMISSAL of the specifications alleged in this paragraph of the petition.

The next specification has to do with another phase of the conspiracy of exaggeration. In substance, the allegation is,

7-r: That Respondent, in various actions instituted by him as attorney for the respective plaintiffs, prepared and submitted, or permitted preparation and submission of bills of particulars containing false and exaggerated statements which he knew—or, with the exercise of reasonable diligence, should have known—were false and exaggerated, and thereby attempted to and did perpetrate fraud and deceit upon the respective courts, defendants and insurers. Five such actions are specified in the bill of particulars (Par. 5):—

(41)

| Title | Court | Insurer |
|---|---|---|
| Bernard Rickles v. Nicholas De Fillipo | Supreme, Bronx Co. | Allstate Insurance Co. |
| Jack Stein v. Charles Goldberg | Supreme, Queens Co. | Employer's Group |
| Bernard Stoller v. John Rushetsky | Supreme, Kings Co. | Empire Mutual |
| Dodell v. Jerry Fessler | Supreme, Kings Co. | Hartford Accident & Indemnity |
| William V. Buscemi v. Nassau Air Conditioning Co. | Supreme, Kings Co. | Aetna Casualty & Surety |

(42)

In my opinion this charge is not sustained by the evidence. I THEREFORE RECOMMEND ITS DISMISSAL. My reasons are these:

No evidence at all was offered, or elicited from Respondent, with reference to the bills in the *Rickles, Stoller* and *Rushetsky* cases. In the *Stein* and *Buscemi* cases the nature of the falsity contended for by Petitioner has to be taken from the tenor of the examination of the witness, since it is not specified in the bill of particulars.

In *Stein* v. *Goldberg,* attention was focussed on the plaintiff's claims for loss of time following the accident (one month, and intermittently thereafter) and for medical services and supplies (approximately $265.00). (*6) As previously noted, Stein took refuge behind his Constitutional privilege. His first refusal was evoked by questioning as to his loss of time from business as a result of injuries sustained in the accident. Given time to consult with his attorney, he resumed the stand and testified that he couldn't do his job in full; he lost some time; he didn't

(*6) Pet ex 24, Par. 5 p. 3, verified by Respondent.

think it was a month; he "stood away a couple of days" and the rest of the time went in and did part-time work; he stayed there a little while and went back home. He didn't remember whether he *told* anyone he was disabled for approximately a month following the accident, didn't recall *discussing* his disability, with Respondent, for the purpose of drawing up a bill of particulars, nor did he remember discussing, with him, how much he had paid in doctor's bills. As to whether he had *spent* any money for medical bills he again invoked his privilege and, on the same ground, refused to answer whether he had ever *told* anybody that he had spent $265.00 for physicians' services and medical supplies. Shown a copy of the bill, he professed inability to recall having seen it before. On his part, Respondent denied knowledge of exaggeration, if any such thing had happened.

(43)

He testified that the information as to the injury itself had been obtained from a report (in his file) rendered by a Doctor Leo Green, to whom Stein had been referred by Doctor Gardstein. The information as to the loss of time was obtained from the client and the information as to the medical expenses, from bills rendered by the treating physician (Gardstein), Doctor Green and others, including X-Rays, and pretty much coming out to the amount claimed in the bill (handed to Mr. DiBiasi). Except that Respondent paid Doctor Gardstein for a report, Stein himself paid the latter's bill. In short, the information was obtained either from the client or the doctors, and there is no evidence to show that Respondent knew, or should have known, that the information on which he relied in preparing the bill was false.

*In Buscemi* v *Nassau* etc., the plaintiff's bill of particulars claimed a total of $496.00 for medical service

and supply, of which, $286.00 was for services. It also made a claim for four weeks loss of time (confined to home and bed) immediately after the accident, and a day or two at various intermittent times "since then", resulting in a loss of earnings for three weeks. (*7) Buscemi's testimony, and his talents, have previously been dealt with at length and need not be reviewed again here. The gist of Respondent's testimony was that the information was obtained either from the client, the employer or the doctor and there is no evidence to show that he knew, or should have known, that the information, incorporated into the bill, was false.

By the next specification, it is alleged, in substance:—

7-s: That Respondent conspired and arranged with various persons to solicit, and to procure through solicitation—directly and indirectly—, legal work and retainers authorizing him to render legal services, in violation of the provisions (44) of Section 270-a of the Penal Law and (the precepts of) Canon 28. The specification is couched in the terms of the Penal Law section. By his bill of particulars (Par. 6-a) Petitioner names Sam Gabrielle and Michael W. Castoro, an Allstate adjuster, as the co-conspirators and alleges (Par. 6-b) that they, respectively, solicited John Campbell (Gabrielle), Helen Thompson, Harry Ketcham and Hazel Cohen (Castoro) to retain Respondent.

In my opinion, the evidence does not support this charge, and I THEREFORE RECOMMEND ITS DISMISSAL. My reasons are these:

The essence of the offense is solicitation or procurement, personally, or through another, acting as agent. The agency-provision accords with the fundamental law of conspiracy, by which, the actor alone is answerable for his acts unless he has been incited thereto (counselled,

(*7) Pet Ex 1, p. 2, par 5; Id., pp. 3, 4, pars. 6, 7.

commanded, induced or procured) by the accused. In other words, there can be no conspiratorial arrangement, as alleged in the petition, unless there has been a combination in an agreement to do the unlawful act. The agreement can, and most often must, be established circumstantially, but the knowledge of the accused and his concurrence in the criminal purpose must be shown or the accusation will fail. Here again, evidence of similar transactions, when available, will have a value on the issues of knowledge and concurrence. But the difficulty with this case is, that there is evidence of but one case of *solicitation*, as distinguished from bare referral, and no evidence that the Respondent had any connection with the *solicitation*. That is the Ketcham case.

Mr. Harry Ketcham testified that, after an accident on November 24, 1954, he reported the matter to his insurer, Allstate. By appointment, he was visited at the Navy-Yard by Michael Castoro, an Allstate adjuster. Ketcham and his two passengers, Tony Fuschetto and John Marzano, were interviewed by Castoro who, after getting the facts, asked whether they had an (45) attorney. They told him they did not. He then asked whether they were interested in an attorney and, when they answered in the affirmative, he gave them Respondent's name, address and telephone number. They, by appointment, went to see Respondent who accepted Fuschetto and Marzano as clients but told Ketcham he would have to get another lawyer, since he was the driver and the passengers could sue him. Ketcham eventually went to Leo Conrad. He doubted that Respondent sent him there. There is no dispute that Castoro was, at the time, a duly licensed New York attorney but, it should be added, attorneys are not exempt from the law of solicitation. Contrariwise, they are its prime target.

Respondent testified that Ketcham, Fuschetto and Marzano had been referred to him by Castoro. There is no evidence that he had any knowledge of the act of solicita-

tion in this or in any other case. Indeed, there is no evidence of solicitation *in* any other case. All that appears is, as admitted by Respondent—who alone supplied the evidence—that Helen Thompson and Hazel Cohen, the other two persons named in Petitioner's bill, had been *referred* to him by Castoro. They were not called as witnesses. There is no proof that they were solicited. Respondent, under cross-examination, testified that he had known Castoro since about 1953 or 1954 but couldn't recall how the acquaintance came about. From then, until the time of the hearing, he wasn't sure how many cases Castoro had referred to him, but it was probably under a dozen. His contention was that Castoro worked on the cases with him and was paid, as would be any other attorney who shared the work and the responsibility. But, he continued, he never sued a defendant covered by Allstate, in any case referred to him by Castoro. In one of the cases, Castoro had referred his own client to Respondent. The client, in turn (he couldn't remember the name) recommended a Jennie Pagano and one Corbino to Respondent. They were considered as referred to Respondent, by Castoro, to avoid (46) suspicion of client-stealing. The evidence of the other transactions, as elicited from the Respondent, gives no aid to Petitioner's case. It may be that Castoro solicited all whom he referred to Respondent, but if so, there is no proof of it. Only suspicion. The other case specified in the bill of particulars is that of John Campbell, who also figured in the false-representation charges.

On this phase of the case Mr. Campbell testified that, after the accident, he went to a collision shop, where he had a friend, and "they gave me Mr. Goldner's name." Whether Campbell asked his friend about a lawyer, or whether the information was volunteered, and if so, under what circumstances, was not made to appear.

The next two specifications were abandoned by Peti-

tioner at the conclusion of the hearing. The substance of the intendment of the allegations of each is, respectively:—

> 7-t:—That respondent, in pretended obedience to Special Rule 4-A of the Appellate Division, First Department, filed with that Court falsified statements of retainer in personal-injury actions, in actual violation of that rule, and otherwise attempted to defraud and mislead the said Court by such filing, and,
>
> 7-u:—That Respondent, in violation of the provisions of Special Rule 4-A of the Appellate Division, First Department, failed to file with the said Court statements of retainer in matters in which he was retained.

There is, concededly, no evidence to support these charges. I THEREFORE RECOMMEND THEIR DISMISSAL.

(47)

It is next alleged, in substance:

> 7-v:—That, in violation of Special Rule 4-B of the Appellate Division, First Department, Respondent failed to provide clients with statements relative to the settlement and disposition of their cases. The bill of particulars (Pars. 8-b, c) alleges that he provided none of his clients with such statements.

In my opinion, the evidence establishes Respondent's guilt of this charge, but not in all of the cases specified in the bill of particulars. My recommendations are deferred until the end of this report. My opinion is based upon:

(1) The testimony of Hyman Borsack, John Campbell, Dominick Dascoli, Stanley Luckman and Gilbert Zucker, that they were given no written statements by Respondent. Whatever other conclusions have been or may be expressed concerning their testimony, I accept that part.

(2) Complete omission to deal with the matter in the testimony of Ned Granat, Max Schmidt and Martha

Schmidt, and failure of recollection by the witness Stanley Gart.

(3) The testimony of Ralph Groeger who, while not professing to have certain recollection of the matter, thought that Respondent gave him a written and verbal explanation of the expenses, without request.

I hold that the applicable rule, having been laid down for the obvious purpose of keeping counsel in particular, and the administration of justice in general, above reproach, compliance therewith may not be waived by the client, but neither need the statement he pressed upon him so as to require him to retain it. Finally, my conclusion as to the Groeger matter is limited to the fact that the client was given *a* written explanation, but not the yellow-sheet put in evidence by Respondent.

(48)

By the next specification it is alleged, in substance:

> 7-w:—That in violation of Special Rule 4-E of the Appellate Division, First Department, Respondent failed to file with said Court closing statements relative to the settlement and disposition of negligence matters based on contingent-fee arrangement. By the bill of particulars, it is alleged that Respondent failed to file any such statements. (Par. 8-b, c)

All of the transactions proved at the hearing occurred prior to the date when this rule took effect. I THEREFORE RECOMMEND DISMISSAL of this specification.

The substance of the next specification is:

> 7-x:—That Respondent divided his fees for legal services with other attorneys, who had neither performed any services nor assumed any responsibility in connection with the matters wherein the fees were earned and that he thereby violated the precepts of Canon 34. The bill of particulars alleges that Respondent shared his fees with Leo Conrad in the matters of Ralph Groeger, Lee Milford Vaughn and Dominick Dascoli, and with Michael Castoro (in the

matters of) Hazel Cohen (Helen) Thompson and (Jennie) Pagano. (Par. 9)

In my opinion this charge is not sustained by the evidence, and I THEREFORE RECOMMEND ITS DISMISSAL. My Reasons:

The canon interdicts a division of fees without a division of services and responsibility in the matter, but the (49) evidence fails to show that such was the case in the transactions specified in the bill of particulars. The first three involved Leo or Leon Conrad. It is not disputed that Respondent shared his fees with Conrad in the Groeger and Dascoli cases, although there is no evidence touching the Vaughn matter. Respondent testified that in all cases sent to him by other attorneys, he paid them, but for sharing the responsibility and working on the case. He had previously testified, with specific reference to the Schmidt case, that Conrad had participated in the preparation and discussion of various papers and pleadings. Elsewhere, he testified that Conrad attended and participated in the closing out of the matters after settlement. Not that Respondent had any burden of disproving allegations unsupported by evidence. But he did give his evidence and it is the only evidence in the case, since, as previously noted, Mr. Conrad was not called. Neither was Michael Castoro.

The only proof of the Cohen, Thompson and Pagano transactions is in the testimony of Respondent, elicited on cross-examination. His sharing of fees with Castoro in these matters is admitted. But he testified that Castoro came into the office, looked at the medical, discussed what should be done in the cases and shared the work and responsibility. Mr. Castoro's absence was not accounted for.

The next specification charges, in substance,

7-y:—That respondent simultaneously represented clients whose interests were antagonistic to and in

conflict with each other, in violation of Canon 6. The conflict is identified by the bill of particulars (Par. 10) as involving William V. Buscemi, a passenger, and Benedetto Giliberti, the owner and operator of the car in which both were at the time of the accident.

(50)

In my opinion this charge is not supported by the evidence. I THEREFORE RECOMMEND ITS DISMISSAL.

The canon dictates that it is the duty of a lawyer, at the time of retainer, to disclose to the client all the circumstances of his relations to the parties, and any interest in, or connection with the controversy, which might influence the client in the selection of counsel. It is declared to be unprofessional to represent conflicting interests, except by express consent of all concerned, given after a full disclosure of the facts. The only evidence in the case shows that this precept was honored.

Respondent testified that he had been put in touch with Mr. Giliberti through one of the latter's friends, who communicated with Respondent's sister. By telephone appointment, Respondent went to see Giliberti, at his pharmacy, where Buscemi was employed. The facts were learned. As a passenger Buscemi, naturally, was a witness. When he asked if Respondent would represent him too, Respondent agreed, but gave both men to understand that, for tactical reasons which he outlined in view of the operator-passenger status, Giliberti's case would have to be processed first. He explained to both how he would handle it, Giliberti first and, when he got through with that, he would handle Buscemi's claim. Accordingly, nothing was done on Buscemi's claim until Giliberti's had been settled in July. In August, Buscemi was brought to Leon Siken's office and Siken's name was used, dummy-wise, as attorney of record. This was done to avert a prejudice which Respondent supposed would visit Buscemi if the insurer found that Respondent was also representing the passenger. In some features of his testimony, Respondent is confirmed by Buscemi.

Buscemi agreed that Respondent had come to see Giliberti and that he knew that Respondent had engaged to represent Giliberti. On one hand, he said, that there was no talk, at that time, of using another lawyer's name and that he didn't hear of (51) Mr. Siken until later. On the other hand, he agreed that Respondent had said, at one time or another, that it "might be advisable to use another lawyer's name." Moreover, it was not until some two or three months after the first interview that *he* got in touch with Respondent about handling the case (the retainer was signed on the first interview) and he was "almost sure" that by then, Respondent had settled Giliberti's case. Thus, by prior agreement made after full and fair disclosure, Respondent did not actively represent Buscemi until a question of conflict no longer existed, and in any event both parties concerned were aware of the situation and expressly agreed. By Buscemi's own acknowledgement, he did not press Respondent for action until the Giliberti matter was over and done with.

The next specification alleges, in substance,

> 7-z:—That Respondent divided fees for legal services with persons other than lawyers, for services rendered by such persons in the settlement of legal claims or suits, in violation of Canon 34. One such person is named by the bill of particulars. (Par. 11) He is James Citroen.

In my opinion, the evidence establishes the Respondent's guilt, as charged. My recommendation is deferred until the end of this report.

The only issue of fact presented here, is whether Respondent, when he admittedly divided his fees with Citroen, knew that he was not a lawyer. He contends that, in good faith, he believed Citroen to be a lawyer. On that issue I find against him. Five checks in payment to Citroen were put in evidence. Three of them I put out of the case as not constituting a division of fees, and I consider them only on the question of Respondent's knowledge (52) of Ci-

troen's status as a layman. As to the payments evidenced by the other two checks, Petitioner's case is convincingly proved, it being stipulated that Citroen is not now and never was a lawyer.

Respondent's testimony was, that he hadn't known Citroen long; he employed and paid him in the Zucker case which, by reference to the settlement-checks, was closed out on March 19, 1954; he had been recommended by someone, not named, and Respondent had heard from other lawyers that Citroen was a lawyer. He understood that Citroen had done business with the most reputable firms in New York, but couldn't remember the firm-names; he couldn't remember whether he consulted the phone book for the number but, in any case, he communicated with Citroen, who represented himself to be a lawyer and, as far as Respondent knew, he was a lawyer. As for the nature of Citroen's services, he helped prepare and settle the cases. He didn't draw pleadings, but arranged physicals and discussed medical aspects, bills of particulars, etc. He didn't sit in on pre-trial sessions nor was he trial counsel. He never went into a court-room with Respondent to participate in any trial or court procedures. He was paid out of Respondent's fees, but "not any percentages." And the "client paid no part of that." Respondent didn't think that there was any ten-percent arrangement but, if there was, there were other reputable counsel whom he also engaged on a retainer-plus-ten-percent basis. On the issue of Respondent's knowledge, all five checks are now considered.

The Zucker case, it will be recalled, was settled for $7,000.00. The ledger showed check #5204, (dated a week before the settlement checks) to Citroen's order, for $700.00, as being charged to that case.

The Groeger case, as will also be recalled was settled for $5,000.00. The ledger showed check #6290, (dated one day before the smaller check) to Citroen's order, for $500.00, as being charged to that case.

(53)

There was put in evidence a photostatic copy of a check #7617, dated May 31, 1955, to Citroen's order, for $950.00, earmarked as issued in the case of *Thompson v. Potonides.* It was subsequently stipulated that it had been identified with check-stubs showing payments to each of four plaintiffs in a total sum of $4,705.00. It was also stipulated that Respondent's was a fifty percent retainer in that case; that, in his ledger, he credited himself with fees of $800.00, $755.00, $1,000.00 and $2,150.00 respectively (which add up to $4,705.00) and that the stub of the Citroen check was also earmarked in the Thompson case.

There was also put in evidence another photostat, of a check #9235, dated March 23, 1956, to Citroen's order in the sum of $575.00. Here, it was stipulated that the stub showed a deposit of $5,750.00 in a Levenstein matter, with check #9235 charged to the same matter.

There was also put in evidence a fifth check, #7010, dated March 23, 1956, to Citroen's order in the sum of $700.00. This check has not been identified with any specific transaction. The ten percent standard of compensation is evident. Perhaps, as Respondent contends, he did engage counsel on a fee plus ten percent basis. But admittedly, Citroen never set foot in a court-room. He was not an attorney, and I am convinced that Respondent knew it. The two transactions considered on the issue of fee-division are those involving the Levenstein matter and the unidentified transaction shown by check #7010, for $700.00. The Zucker, Groeger and Thompson cases were not considered on that issue because the figures show that the Citroen payments (or expenses including his payment) were taken from the top and not from the fees. Respondent's testimony to the contrary is rejected.

(54)

By the next specification it is alleged, in substance,

> 7aa:—That Respondent wilfully procured and induced clients and witnesses to testify falsely at hearings being conducted, by an Additional Special Term of the Supreme Court, into the conduct of attorneys and others. Petitioner's bill of particulars names nine such persons and alleges that Respondent told them to state that they had received the proceeds of certain checks issued in their respective names when, in truth, they had not and when, in truth, the proceeds thereof had been received by Respondent. (Par. 12)

As developed at the hearing, the core of the charge is that Respondent procured the clients to falsely testify that they had received the smaller checks and their proceeds. Of the nine persons named, six must be culled as having given no evidence in the area. They are John Campbell, Hyman Borsack, Ann Borsack (not called), Bernard Rickles (not called), Bernard A. Stoller (not called), and Stanley Luckman. Those who did testify on the subject were Ned Granat, Dominick Dascoli and Gilbert Zucker.

In my opinion the evidence sufficiently establishes Respondent's guilt of having induced and procured Dominick Dascoli and Gilbert Zucker to testify falsely, as charged. My recommendation is deferred until the end of this report.

Respondent's guilt depends upon the testimony of admitted perjurers and, of course, a conclusion of guilt is insupportable without external corroboration. In the Granat case it is lacking and there is evidence in the testimony of Lewis Bernstein, an attorney not involved in this proceeding, that Granat was indebted to him and that a sum was paid, by Respondent, to the attorney, in payment of the debt. Respondent's testimony was to the same (55) effect. There is a brother-in-law relationship

between the attorney and Granat and, while the attorney had profitable business dealings with Respondent he also has ties of affinity with Granat. Granat denied having authorized Respondent to pay the sum of the smaller check over to his brother-in-law, but as the record will disclose, he had a poor memory and otherwise seems to have a sub-normal mentality. Most of his examination was by leading questions and, when not led, some of his responses failed to meet the questions asked. They answered matters previously inquired into. Of course, Respondent may have taken too much upon himself in handing over Granat's money in payment of the debt, but the charge is perjury and, even though the prudence of the action might be doubted, or even the authority, corroboration of the perjury charge would have to be found in perjury, committed by Respondent and, by Mr. Bernstein, through Respondent's procurement. The only matter of doubt in Mr. Bernstein's testimony was the amount. It might, he said, have been one or two hundred dollars, but he couldn't be sure. I resolve the doubt in Respondent's favor.

Neither Dascoli's testimony, nor that of Zucker, needs to be considered at any length. Each admitted having perjured himself by testifying, at the Judicial Inquiry, that he had received the smaller check, kept it and got the proceeds. Each said, in substance, that Respondent induced him to so testify. Dascoli recanted after he had been threatened with perjury and after he had telephoned his wife and talked it over with her. Zucker let his perjury lie, unconfessed, until Petitioner began preparation for the institution of this proceeding. Meanwhile, he had compounded it with a false affidavit. His remorse is quite apparent from the record. It was even more so in the court-room. I have freely used the word perjury, implying a finding that these two men did testify falsely before the Judicial Inquiry, as just indicated, and I do so find. There is no dispute that they testified to the

effect just described, and the evidence convinces me that neither of them kept the smaller checks nor received the proceeds. (56) I believe the testimony of each, that Respondent procured him to testify to the contrary. The required corroboration has been supplied by the respondent himself.

An important aim of the Judicial Inquiry was to discover where the smaller checks and their proceeds had gone. It seems obvious that the purpose was to open the path to further investigation and weed out wrongdoers in various areas. A variety of offenses was suggested by the tenor of Respondent's cross-examination in the instant case. He denied all of them. The aim of the perjury committed at the Judicial Inquiry was, just as plainly, to thwart discovery of where the checks had gone and who had gotten the proceeds. The accomplices are corroborated by evidence that Respondent fabricated evidence to avoid a visitation of justice for the subornation and thereby evinced consciousness of his guilt of that crime. Reference has already been made to the yellow sheets which Respondent put in evidence on the hearing. He testified that they were prepared and placed before the clients at the closing. Not once was the sheet used in cross-examination of the client to whose case it referred. But that is not all.

In the Dascoli case, as will be recalled, the Ledger-entries and the distribution figures showed that the expenses had been taken from the top, before distribution. In that respect, it was in accord with the system of computation used in all other cases proved. The *Thompson* case (page 38, ante) was figured the same way. But in the yellow-sheet, the expenses were taken from the client and they included items not shown in the ledger. And, by more than coincidence, deduction of the expenses from the client's share gave the same net as shown to have been paid by the primary check. Dascoli, it will be recalled, had no complaints, then or now. *He was satisfied*

*with his $3,000.00,* as he agreed on cross-examination. But the yellow sheet shows that he got an additional $500.00 as "Adj—lost salary." His statement that he was satisfied was accepted, on cross-examination, without challenge. And then (57) Respondent produced his yellow sheet and testified that there had been a complaint which occasioned the $500.00 increase.

In the Zucker case the same things happened. Ledger-entries and distribution figures show expenses taken from the top, including Citroen. The yellow sheet shows them taken from the clients in a lesser amount, Citroen excluded, with numerous items not shown in the ledger. But by the same more-than-coincidence, the total of the expenses, when deducted from the client's share of one-half of the gross, makes the same primary amount paid to Zucker. And, though Mr. Zucker "really wasn't interested at the time", the yellow sheet shows that $1,000.00 was added to his primary check:—"Clients—Leo asked favor." Respondent's testimony ran in the same direction.

I find the yellow sheets to have been fabricated to frustrate discovery of the truth as to where the smaller checks and their proceeds had gone, both in the *Dascoli* case and the *Zucker* case and, were there any point to it, in all of the others. But the others are not needed to negate inadvertence or mistake in the Dascoli or Zucker yellow sheets. Respondent excluded that possibility, under oath. In that case, the yellow sheets are good evidence of a comprehensive scheme and plan to conceal the actual disposition of the proceeds of all of the smaller checks and thus defeat the purposes of the hearing. I find that Respondent committed perjury by falsely testifying that his yellow sheets were records made in the regular course of the transactions concerned and that they were displayed to the clients, and by falsely testifying that the clients had kept the checks and received the proceeds. Neither was true. If such yellow sheets were in fact employed by Respondent as a regular device in the settle-

ment of every client's negligence case, it is most singular that Respondent, ably represented by most astute counsel, did not seek to buttress his testimony by producing the files of every case settled by him during the periods in question and exhibiting the presence therein of such yellow settlement sheets. That omission speaks volumes.

The next specification charges, in substance,

(58)

> 7-bb:—That Respondent attempted to impede—and impeded—the administration of Justice by wilfully procuring and inducing clients to ignore subpoenas requesting their appearance at hearings of the Additional Special Term.

In my opinion this charge is not supported by the evidence. I THEREFORE RECOMMEND ITS DISMISSAL.

In this case, I accept, without reservation, the testimony of William C. Mattison from which it appears that a jurisdictional issue was an open and moot question right down to the second week of September 1958, and that there was an understanding between counsel, that witnesses were not to be pressed for attendance until the question had been decided. I hold that any advice accordingly was given, in good faith, consistently with that understanding, and does not involve Respondent in guilt of the offense charged.

The next specification is alleged in Paragraph 7-cc: of the Petition. It need not be summarized farther than to say that, as narrowed by the bill of particulars, it charges Respondent with Subornation of perjury, in that he procured and induced William V. Buscemi to testify falsely in the matter and along the lines discussed earlier in this report (pages 4 to 10 ante.).

I RECOMMEND ITS DISMISSAL. Beyond a reiteration of the fact that Buscemi is not corroborated, comment seems unnecessary in view of the prior content of this report.

The charge made by Paragraph 7-dd: of the Petition,

is in substance, that Respondent failed to maintain a respectful attitude toward various courts. (Bill of particulars, Par. 15). It is wholly without evidence to support it. I RECOMMEND ITS DISMISSAL.

The charge made by Paragraph 7-ee: of the Petition, is in substance, that Respondent agreed with clients to bear the expenses of litigation, without reimbursement.

(59)

It is, in my opinion, unsupported by the evidence. The clients named in the bill of particulars are Rickles, Campbell, Zucker and Stoller. Rickles and Stoller were not called, Campbell and Zucker testified to no such agreement and Respondent denied it.

I RECOMMEND ITS DISMISSAL.

The charge made by Paragraph 7-ff: of the Petition, is in substance, that in the prosecution of various claims, Respondent prepared or permitted preparation of statements which he knew or should have known were false and exaggerated, etc., with intent to defraud insurance companies, etc. The offense is alleged to have been committed in all cases. (Bill of Particulars, Par. 17). This is, in effect, an inferior degree of the offense charged in Paragraphs 7-a to 7-j of the petition, already dealt with in this report. In my opinion it is not sustained by the evidence. I THEREFORE RECOMMEND ITS DISMISSAL.

The charge made in Paragraph 7-gg: of the Petition is, in substance, that Respondent grouped claims in violation of applicable Special Rules and Precepts of the Canon of Ethics. It was abandoned by Petitioner at the conclusion of the hearing, there concededly being no evidence to support it.

I RECOMMEND ITS DISMISSAL.

(60)

## CONCLUSIONS AND RECOMMENDATIONS

Conscious of the impact which an adverse recommendation by me may have upon the Respondent's professional career, I have assumed the task assigned to me by this Court with prayerful consideration and with a view towards resolving every reasonable doubt in Respondent's favor. I believe that I have done so. In spite of such an approach and a predisposed reluctance to look favorably upon charges thrust on a member of the Bar I have been forced to the conclusion

1. That the "Respondent failed to provide clients" in some instances "with statements relative to the settlement and disposition of their cases" as required by Rule 4-B of the rules of the Appellate Division First Department. (Charge 7-v, dealt with at p. 47 of this report)

2. That "Respondent divided fees for legal services with persons other than lawyers for services rendered by such persons in the settlement of legal claims or suits in violation of Canon 34", to wit, with one James Citroen. (Charge 7-z, dealt with at p. 51 of this report)

3. That "Respondent wilfully procured and induced clients and witnesses" specifically Dominick Dascoli and Gilbert Zucker "to testify falsely on hearings being conducted by an additional Special Term of the Supreme Court into the conduct of attorneys and others" and more specifically "that Respondent told them to state that they had received the proceeds of certain checks issued in their respective names when, in truth, they had not". (Charge 7-aa, dealt with at p. 54 of this Report) and,

4. That Respondent committed perjury before me in his testimony with reference to the so-called "yellow sheets" and the alleged retention by his various clients of the proceeds of the "smaller" checks herein dealt with

by reason of which he is unfit to remain a member of the profession of the Law.

(61)

I should add that if Items 1 and 2 above were alone involved I would recommend that the punishment to be imposed upon the Respondent be a severe censure.

Most respectfully submitted,

Dated: March 6, 1961

J. IRWIN SHAPIRO
Acting Justice of the Supreme Court

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## Memorandum Opinion of Appellate Division

PETITION OF EDWARD S. SILVER, DISTRICT ATTORNEY OF THE COUNTY OF KINGS, PURSUANT TO SECTION 90 OF THE JUDICIARY LAW, PETITIONER v. DAVID A. GOLDNER, AN ATTORNEY AND COUNSELLOR AT LAW, RESPECTIVELY

SUPREME COURT, APPELLATE DIVISION 2d Department 15 A. D. 2d 558, 222 N.Y.S. 2d 854 (Dec. 27, 1961)

Memorandum by the Court:

"In a disciplinary proceeding against respondent as an attorney and counsellor at law, petitioner moves to confirm the report of the Special Referee.

"Motion granted; respondent disbarred and his name ordered to be struck from the roll of attorneys.

"In our opinion, the charges enumerated below upon which the Referee found respondent guilty, are amply supported by the record and show clearly his unfitness to remain a member of the Bar. These charges are:

(a) failure to provide clients with statements relative to the settlement and disposition of their cases; (b) division of fees for legal services with persons other than lawyers; (c) subornation of perjury; (d) perjury committed upon the hearings before the Special Referee.

"In our opinion, respondent's guilt of charges (a) (b), and (c), supra, is sufficient to warrant his disbarment without consideration of his guilt on the fourth charge, (d). However, his guilt on such fourth charge leaves no question as to the nature or extent of the discipline here required. When an attorney has deliberately attempted by perjured testimony to escape the consequences of his misconduct, he is no longer fit to remain a member of the profession (Matter of Sidman, 268 App. Div. 1040, 52 N.Y.S. 2d 286, leave to appeal denied 294 N.Y. 645, 60 N.E. 2d 551; Matter of Smith, 148 App. Div. 291, 295, 132 N.Y.S. 304; Matter of Thorn, 164 App. Div. 151, 149 N.Y.S. 507).

"A further hearing is unwarranted. The record amply sustains the findings of the Special Referee, without resorting to any alleged extra-judicial checking of the so-called "yellow sheets".

Beldock, Acting P.J., and Christ, Pette and Brennan, J.J., concur.

Kleinfield, J., not voting.

## Order of Affirmance of Court of Appeals

COURT OF APPEALS

STATE OF NEW YORK, ss:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 26th day of March in the year of our Lord one thousand nine hundred and sixty-four, before the Judges of said Court.

WITNESS,

The HON. CHARLES S. DESMOND,
Chief Judge, *Presiding.*

RAYMOND J. CANNON, *Clerk.*

REMITTITUR March 26, 1964.

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2

No. 445

In the matter of

EDWARD S. SILVER, District Attorney, Kings County, pursuant to Section 90 of the Judiciary Law,

Respondent,

vs.

DAVID A. GOLDNER, an Attorney and Counsellor at Law,

Appellant,

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BE IT REMEMBERED, That on the 12th day of December in the year of our Lord one thousand nine hundred and sixty-three, David A. Goldner, an Attorney and Counsellor at Law, the appellant in this cause, came here unto the

Court of Appeals, by Frederick B. Boyden, his attorney, and filed in the said Court Notices of Appeal and return thereto from the orders of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And Edward S. Silver, District Attorney, Kings County, pursuant to Section 90 of the Judiciary Law, the respondent in said cause, afterwards appeared in said Court of Appeals pro se.

Which said Notices of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Frederick B. Boyden, of counsel for the appellant, and by Mr. Stanley M. Meyer, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, without costs.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Appellate Division of the Supreme Court, Second Judicial Department, there to be proceeded upon according to law.

Wherefore, it is considered that the said order be affirmed, without costs, as aforesaid.

And hereupon, as well as Notices of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Appellate Division of the Supreme Court, Second Judicial Department, before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Appellate Division, before the Justices thereof, &c.

RAYMOND J. CANNON
Clerk of the Court of Appeals of the
State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
Albany, March 26, 1964.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

(SEAL)

RAYMOND J. CANNON
Clerk.